Supreme Court, U.S.
FILED
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

.....

BRIAN T. HEADY, et ux., aka HEADY ELECTRIC CO.
PETITIONER

V.

BARCLAYS BANK OF NEW YORK, N. A.
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEALS, STATE OF NEW YORK

.....

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

1. By virtue of the decisions rendered in the Barclays v Heady litigation, have the inferior courts in New York State abridged the constitutional rights of the petitioners thereby setting a precedent infringing on the rights of others?

2. Barclays admittedly issued an Order of Seizure without first interfacing with the judicial system. Can the use of such an Order of Seizure and the enforcement of said Order by the police be judicially sanctioned without violating the provisions of the Fourth Amendment to the Constitution of the United States protecting citizens from unreasonable search and seizure?

3. Was the ruling to restrict the Heady trial to a judge without a jury a violation of Amendment Seven of the United States Constitution guaranteeing a right to a jury trial, thus nullifying this basic right for New York citizens?

4. Have the decisions of the inferior courts below carved out an exception to the due process rights of citizens guaranteed under the Fourteenth Amendment to the United States Constitution?

5. Are the decisions of the lower courts in conflict with lawfully enacted penal codes, statutes and rules of law sending a message that in New York State citizens are no longer allowed to defend themselves against economic oppression?

6. Are the decisions of the lower courts in conflict with Banking Law, and if upheld will public confidence and trust in the banking system be eroded to the detriment of all?

7. Are the decisions of the lower courts in conflict with the statutory provisions of the Uniform Commercial Code, and if upheld will public trust and confidence be further destroyed to the detriment of the public welfare?

PARENT COMPANIES AND SUBSIDIARIES

PETITIONER: Heady Electric Co. Inc., is wholly owned by petitioner Brian T. Heady. Coral A. Heady, a named litigant, is the wife of Brian T. Heady and to the extent it is applicable and allowed by the court joins in this appeal.

RESPONDENT: A listing of parent companies and subsidiaries was previously included in moving papers by respondent Barclays Bank of New York, N.A. ("Barclays"). The list is repeated below.

Barclays PLC
Barclays Bank PLC
Barclays Corp.
Barclays Bank of New York, N.A.
Fenchurch Corp.
Baroreo I Corp.
Baroreo II Corp.
Barclays New Jersey Corporation
Baroreo Lloyd Corp.

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Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS ENTERED

Barclays Bank of N.Y. v Heady Electric Co. - 212 AD2d 749

STATEMENT FOR BASIS FOR JURISDICTION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted for compelling reasons.

This writ should be granted for the following:

a) The court of last resort in New York State has entered decisions which are in conflict with decisions of the United States Supreme Court.

b) The court of last resort in New York State has entered a decision upholding a lower court rulings that so far departs from the accepted and usual course of judicial proceedings, and has sanctioned acts that if upheld would preclude any necessity to interface with the judicial system.

c) The inferior courts in New York State have rendered decisions on important federal questions that should not be settled in lower courts, but rather have been and should be determined by the United States Supreme Court.

d) The inferior courts in New York State have settled questions that should be settled by this court and conflict with relevant decisions of this court.

(i) **DATE OF ORDER TO BE REVIEWED:**
March 26, 1996

(ii) **DATE OF REHEARING:**
June 28, 1996
Notice of Entry, July 2, 1996

CONSTITUTIONAL PROVISIONS

Amendments to the United States Constitution

Amendment 4. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 7. Jury by trial in Civil Cases

In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law.

Amendment 14. Rights of Citizens

Section 1. Citizenship All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the Unites States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any state deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTUTORY PROVISIONS INVOLVED

1. CPLR 321
2. CPLR 321:2
3. Uniform Justice Court Act 501
4. Banking Law 9-g
5. Penal Code 155.30
6. Penal Code 155.40
7. Penal Code 160.1
8. Penal Code 160.15
9. Penal Code 190.5
10. Uniform Commercial Code 9-503
11. Uniform Commercial Code 9-506
12. Uniform Commercial Code 1-208

STATEMENT OF THE CASE

On the day my young son first realized that there was no Santa Clause he looked at up at me, with a terrible expression of anguish on his face, and said "Dad do you know how it feels to live your whole life believing something, and then find out it was all a lie." For him, at that moment, I had no adequate answer.

Several years later when the events in this litigation began unfolding I felt the emotions he must have felt that day. His words would stalk as they inspired, enervate as they nurtured, and encourage as they comforted. His words could simultaneously make me pause and stimulate me to continue. In the end they would always be one of the energies to keep me focused.

Briefly, this legal case is a story about a major international bank that, after lending my company money, decided they wanted more. The loan officer wanted to add personal assets and a mortgage on my home to secure a business loan. They were insistent on this demand despite my excellent payment record and no danger of delinquency by the company. I angered the bank by not agreeing to their demands.

Ten years later the validity of their action is still in limbo, a.k.a., the justice system. With my resources cut off I have been forced to act as my own attorney. This has not been easy. I believe that little worthwhile is. More important, it has been a learning experience from which I have grown. I am thankful for the opportunity that I have been given. I pray I have met the challenge the right way.

I apologize if this brief is not in the usual legalistic terms. However is honest and said the only way I know how to say it. I cannot separate legal concepts from moral values. I deal honestly with others.

My son had a belief shattered. My belief is: there is equal justice under the law. I have been left without the funds necessary to hire legal representation, but no amount of legal counsel could alter the facts or the law. And your prestigious body can use this case to represent to a doubting public that our nation's sacred underpinning principles are in full force and effect, even when presented in a simple presentation.

This is what happened.

In December of 1985, Brian Heady was CEO and owner of a multi million dollar corporation. The financial statement demonstrated a healthy company with profits in excess of $470,000. Heady's relationship, with Barclays Bank of New York N. A., was one in which he was repaying his loans in advance. He was over $40,000 ahead of the payment schedule. His total debt to Barclays was $300,000. Heady's personal financial statement was significant, with assets exceeding a million dollars.

On December 31, 1985, without notice or demand for payment, Barclays Bank withdrew $122,201.30 from Heady's accounts. Although Heady had deposited money in these accounts, the bank refused to honor his checks. The bank took the money for themselves. They returned checks drawn on those accounts stamped with the notation NSF, meaning "not sufficient funds." Warrants for Heady's arrest were issued by the local Sheriff.

On January 2, 1986, Barclays mailed Heady a letter notifying him of their seizure of his accounts. He received this notification in the following day, January 3, 1986. At first he was very confused. What had happened? He contacted Barclays. The loan officer told him the bank had seized the collateral because he had walked out of a closing.

Heady had walked out of a closing eleven days earlier. The reason he walked out was because Barclays presented documents for his signature that did not reflect prior agreements. There was no legal requirement for him to sign. At that closing mortgage documents were presented with a dollar amount that was increased from $100,000, as had been agreed, to $225,000. This was done without Heady's knowledge or consent. Barclays' attorney had also added to the documents personal guarantees to be signed by Heady's wife. And they attempted to force him into paying a $4,000 bill covering cost for the transaction.

Heady refused to agree to any requirement that his wife sign any personal guarantees. He had told the bank that before his wife would sign personally for anything, before she would do that, Heady would mortgage the family home and pay the bank completely. He would then be his own bank.

On January 3, 1986, walking out of that closing was given as the reason

for offsetting against Heady's accounts, but, regardless of the reasons for the offset Barclays loan officer said she would return the money to the accounts and stop bouncing checks if Heady would give the bank a $100,000 mortgage on a real estate development project that he and his wife were planning. He agreed. A date, January 8, 1986 was set to meet to confirm the terms prior to a closing. Both the banks attorney and Heady's company attorney would attend that meeting.

Before the meeting could take place, on January 7, 1986 another surprise from the bank. Barclays served Heady with a Summons and Complaint that stated he was in default of his loans, and demanded a judgement against Heady for $177,798.70. The bank had started a lawsuit against him! Why would the bank on one day agree to meet to define terms, and then on the following day sue him for an alleged default?

Confused, he asked his attorney what this meant. He was told Barclays was creating a paperwork trail to justify their December 31, 1985 actions. He was not to worry however. The whole matter would become a mute point when Heady gave the bank the mortgage they were demanding.

On January 8, 1986, with attorneys present, Heady met with the loan officer from the bank. The terms of the mortgage agreement and associated legal documents to be signed were agreed to. All would meet the following day, at the bank, for signatures.

On January 9, 1986, Heady arrived at the bank. Papers were presented for signing. By this point Heady did not trust Barclays statements. Only by their deeds would he know them. He did not sign anything for the bank without first reading the document.

Heady separated the papers that had been presented for signature and began to read. One of the documents prepared for his signature was a letter from Barclays which stated that Heady acknowledged being in default of his loans in accordance with conditions contained in the bank's commitment letter. Heady knew he was in no such violation. He told them to identify the condition he had not met. They refused to commit to anything specific. Barclays and their attorney insisted that Heady sign the document as presented. To add insult to injury, they offered to pay him $100 if he would stipulate to a default! He refused to

sign without someone identifying the default, naming the condition he had not met. They would not identify the alleged violation.

The mortgage amount had increased from the banks original demand. The mortgage presented was for $225,000 not the $100,000 that had been requested. And again, despite assurances to the contrary, $250,000 in personal guarantees from Heady's wife had been added to the documents. Barclays was adding $475,000 in new guarantees. Heady's total debt on that day was $177,798.70 less than half of Barclays new demand for collateral security.

A stalemate ensued and no documents were signed. Heady left the bank vowing to borrow from another bank and pay Barclays the entire balance due, the full amount they were suing him for. He would use his inventory and office equipment as collateral to borrow money. He went out over the next few days and met with other banks to explain his dilemma. He would need between $200,000 and $250,000.

Barclays seemed determined to stop him. Five days later, on January 14, 1986, Barclays Bank sent armed guards to Heady's Poughkeepsie, New York office and warehouse. Acting under what they told Heady was a little known provision of the penal code, and using an "Order of Seizure," Barclays confiscated over a quarter of a million dollars in inventory. Barclays Bank also seized office equipment and company computers. They also seized accounts receivables worth in excess of a $200,000. City Police enforced this Order of Seizure over Heady's protest. Barclays had seized the collateral Heady needed to secure loans to repay them! Something was wrong.

Shortly after that, Barclays delivered another Order of Seizure to the another police department. With police protection, late on a Sunday night, at 2:00 a.m. in the pre dawn hours of January 27, 1986 Barclays broke down a gate to a construction site, cut or broke locks securing the site and entered a field office. They then proceeded to tow the office trailer and construction equipment from a multimillion dollar construction project. Heady notified the police but was told that Barclays was acting within their rights and that Barclays had delivered a court order, an Order of Seizure, that allowed them to act as they did.

On February 23, 1986, Barclays Bank sold the seized equipment at an

auction held during a freezing rain storm. Radio warnings told people to stay off the streets because of the icing conditions. Few people attended.

The first question anyone might ask is, "Why?" There are theories, but they are just that, theories. What is at issue before the court is a question to determine if the actions of the bank were allowed under the law. The question before the court is one of constitutional protections from unlawful search and seizures, and constitutional protections of due process. What is at issue before the court is: Are the lower courts empowered to render decisions that carve out exceptions to constitutional guarantees? These exceptions are dangerous precedents and are currently the judgements of the New York Court of Appeals.

What is before the court is a question similar to one asked long ago during a different kind of struggle. Can a nation conceived in liberty and dedicated to the proposition of equality continue to endure? Is due process still a viable underpinning tenant of our constitutional republic? Can a nation, where all are entitled to equal justice, survive the test of time? Or, as we near the turn of the century, are those things a fading memory? Worse yet, was it always simply all a lie? Due process and equal justice under the law, are these basic principals fact or fiction, your Honors?

The Supreme Court does not judge the facts of a case, but a significant factor in this case is Heady had not defaulted. He was ahead of schedule on his payments. At trial, the bank admitted this fact. Through legal machinations Barclays trashed due process rights and claimed, although there was no monetary default, a technical default existed. Over the years they have identified this technical default as different things.

In Barclays' Summons and Complaint the basis of the alleged technical default was a judgement against Heady. This judgement was a long standing legal tug of war that was disclosed on Heady's financial statement two years prior. The basis for default changed quickly when the attorney for Barclays realized that the bank had always known of this debt. Barclays amended their lawsuit and added the words "among other things" to allow for some other legal strategy to justify their actions. Over the next six months Barclays attorney filed paper after paper with the courts constantly changing the reason a default was declared. Finally,

they settled on a clause in the loan agreements that gave the bank a right to declare a default if the bank became concerned about the loan or the borrowers.

Legally, Barclays argued, this was allowed under an insecurity clause contained in the loan agreements. If a bank becomes insecure, it can declare a default. In essence, Barclays testified that in the mind of the loan officer there was a question as to whether the Heady company might default at sometime in the future. Therefore the bank was insecure and within their rights to declare a default. The one thing the bank forgot to do was to declare such a default. Instead, in defiance of the law, the bank simply stole the money from Heady's accounts.

It is worth noting that the law clearly states: If a lender wants to declare a default it must first, in advance or on the same day, notify the borrower. Barclays' testimony, and the evidence supports, they never notified the borrower as required by law. Instead they put a letter in the US Mail three days later notifying him of the confiscation of money from his account.

A bank can repossess pledged collateral security from a borrower that defaults on payments, but it can only do so peacefully with the borrower's permission. By law, there can be no breach of the peace. Absent permission, or an ability to do so peacefully, the bank would be required to go before a judge and file a motion under replevin statutes. After judicial review and sanction they could proceed with an "Order of Seizure" to take collateral, using the police departments to enforce the Order.

In the Heady case the bank neglected one step. They failed to interface with the judicial branch. They did not go before a judge. They simply printed a Order of Seizure and delivered it to the police as if it had been issued by a judge. Due process and constitutional guarantees apparently mean as little today as they did 220 years ago to the powers from this London based bank. Barclays took the law into their own hands. Instead of going to a judge, the bank issued their own Order of Seizure. Barclays, not a judge, signed the Order of Seizure. They delivered this order to the police. Barclays then sent armed personnel into the Heady offices and warehouse. At gunpoint, using a fraudulent "Order of Seizure" Barclays stole the Heady inventory. The police ordered Heady

to cooperate or face arrest.

By any reasonable measure someone standing in front of you with a gun, demanding your consent, is a breach of the peace. The banks gunman testified there was no breach of the peace. During court proceedings about drawing the gun, he said if he "drew his gun in anger there would have been dead people." There were no dead bodies, so the trial court ruled no breach of the peace was evident! Upholding this methodology is tantamount to giving the person with the biggest gun control over the law.

Barclays continued their legal case by declaring that items seized but never pledged as collateral were of no consequence as Heady was barred by the legal principle of estoppel from defining the nature and character of the wrongfully seized items. Therefore, although Barclays seized tens of thousands of dollars in items never pledged as collateral and many items owned by third parties, Heady was denied the right to defend against these wrongful actions.

The auction sale of Heady assets yielded less than $20,000. In defiance of laws protecting a borrowers right to redeem seized collateral, Barclays refused an offer from Heady of $177,798.70 which was the remaining principal balance after the $122,201.30 December 31, 1985 offset. Their reason for rejecting the offer to pay in full all monies actually due, was that Heady had refused to pay a $45,000 collection fee to the banks attorney. Barclays attorney argued that since the bank had declared a default, the loan agreement called for an attorney fee of 15% of the principal due at the time of default. Default by their definition was prior to the offset and accordingly the 15% was applied against the entire $300,000. Collection was now enforceable without regard to the fact there was never any missed payments, never any monetary default, and Barclays never asked for prepayment of the loan. This demand for attorneys fees flies in the face of statutes that require attorney fees be justified.

Sale of collateral at auctions typically yields only pennies on the dollar. Barclays knew this and had the inventory valued prior to auction. Their expert estimated a return in excess of $150,000. However, a sale at auction will only return an expected yield if there are ample interested buyers. Few interested buyers would drive in a freezing rain, or stand

outside in hazardous weather, to bid on anything.

Why would a bank seize and sell at auction the tools of a contractor, tools that are needed to produce the income necessary to repay the loan? One of two things seems likely. Either Barclays thought the proceeds of the auction would fully cover all moneys due the bank, or they didn't care about the money because there was a hidden agenda.

Part of the Heady collateral was real estate located in Poughkeepsie, New York. The bank held a $100,000 collateral security mortgage on this property. Barclays claimed, during court proceedings and in their moving papers, that this mortgage was worthless. But, during the litigation Heady arranged a sale of the real estate for $187,000. This was more than the mortgage amount and more than the loan amount still due at Barclays Bank. Heady offered to deposit the proceeds in an escrow account. Barclays and their attorneys blocked the sale. They refused to allow anything to happen to the real estate during litigation. You see, if Barclays had allowed this sale to proceed it would have once again proved Heady correct. The property was indeed worth considerably more than the mortgage, considerably more than "worthless" as Barclays falsely testified at trial. Again they lied to the court. They lied under oath. Their lies are an intentional obstruction of justice. Their actions are an obstruction of due process. Barclays actions in this case are criminal.

After winning at the lower court level and armed with a judgement Barclays withdrew $100,000 in cash from Heady's account in another bank. But, for whatever reason, Barclays just let the real estate part of their judgement sit idle. Over the years the real estate fell into disrepair. Its ownership was in limbo with the bank asserting management rights. Ad valorem taxes became an issue. Barclays took no measures to liquidate the property, secure the property, or any other action to turn this property into an income stream. It could have been a cash cow, instead they choose to let the tax bills accumulate. When Heady was notified of an ad valorem tax deficiency he traveled to Poughkeepsie to resolve the issue. He was told the bank's attorney was handling things. He would have to talk to her.

A tax sale followed. Heady again tried to redeem the property. He was told by Poughkeepsie city officials that he would not be allowed to redeem as they did not like absentee landlords, and further that Heady

had rented to college students from a nearby Catholic College. The city felt college students were disruptive, and the city could realize a greater income by not allowing Heady to pay the tax. The city could then sell the real estate at auction. Several months later the city did exactly as promised. The net income to the city was $50,000. Barclays, it was later discovered, had sold their mortgage interest. The buyer of the mortgage was left with nothing.

Several years went by waiting for a trial date. Every time a date was given the bank would present a legal motion at the preliminary hearing and the trial would be postponed. It took six years to finally get a trial date. A jury was prohibited from hearing the evidence. The bank successfully argued that the terms of the loan negated any right to a jury trial! How can the terms of a loan void basic constitutional protections or guarantees?

A underlying reason for postponing the trial became evident at trial. Barclays admitted to criminal acts! The trial judge in the civil case was not interested in criminal actions in a civil case. The local District Attorney, in a follow up letter, explained the statute of limitations prevented criminal prosecution. By using delaying tactics Barclays had moved the trial thus protecting themselves from prosecution. Justice delayed in this case was justice denied. And even now the frauds continue, the obstruction of justice continues. In seems the deeper they got in, the more lies they told, the more influence they seemed to have at every level. And all of that leads to a question for this court. Why are the Heady defendants rights to equal justice being summarily dismissed?

At trial Barclays' attorney objected to every witness Heady presented. The judge refused to allow expert witness testimony proffered by the Heady defense. Barclays objected to every important question that was asked. The judge continuously ruled in favor of Barclays. At one point Barclays' attorney stood in front of a plaintiff witness and shook her head indicating a yes or no answer after each defense question. The witness would then give the answer directed by the plaintiff attorney. During this episode the judge turned his head directly toward the witness and acted as if he did not see this charade.

In presenting its case at trial, in opposition to the actual events as confirmed by the documentary evidence, Barclays asserted Heady had

refused to give substitute collateral. But with a thoughtful look the record reality becomes abundantly clear. In a hidden agenda, the collateral that Barclays wanted was the Heady residence valued in excess of a half million dollars. Heady explained to Barclays that rather than give his residence as collateral he would mortgage his home and pay the bank in full. He would then be his own banker. Barclays was not impressed with his attitude and tried to trick Heady through a series of legal documents into giving up a security interest in his home. Heady simply refused to be tricked and refused to mortgage his home to Barclays. A look at the record will reveal Heady had in fact given Barclays all of the collateral they had requested at the time the loan was issued.

The record is clear. The borrower had given the bank the collateral requested and the bank had advanced the funds. Barclays was certainly within their rights to add demands for new collateral, but the bank does not have a right to gestapo your business and simply close you down if you refuse their demands. Barclays could have called the loan due and given the borrower a chance to repay. No refusal by Heady to pay has ever been alleged.

If someone borrows from a bank are they obligated to do business only with that bank and with that bank alone? Barclays, by their actions as well as their words, had given the borrower no alternative. Do business with us, or else! This concept sounds more like a loan from some underground criminal group. But regardless, Barclays own admissions are fatal to this line of prosecution. When questioned at trial the loan officer was asked if Heady had in fact delivered the collateral as requested. She replied simply "Yes he had."

It is also worth noting that plaintiff Barclays defended their actions at trial. When a plaintiff takes on a defense posture, it tells even a casual observer the plaintiff is concerned that their actions were wrong.

Barclays stated that Heady's business was in financial trouble. This allegation is absurd. If that were remotely true why would Barclays, on January 3, agree to return the money to the Heady accounts. If the Heady business was in trouble why would Barclays agree to redeposit the money only a few days after the offset against him? No reasonable banker would return money to a company or person that could not repay.

The simple truth is Heady did repay his loans, and his company was showing a good profit. This allegation must fail because Barclays knew of Heady's sound financial condition. Barclays was willing to advance money if Heady would agree to additional collateral. Barclays attorney made financial condition an issue as a means of defense of the bank's wrongful actions.

Money or repayment was not the concern. Simple proof of this can be shown by the loan officers testimony. When asked, why they were willing to give back the money, Barclays loan officer answered "Because we would have the real estate collateral." Even the bank's vice president admitted the offset and acceleration was not based on financial reasons. Heady had a reputation of paying loans back in advance.

The plaintiffs next allegation was Heady had lost IBM as his major customer. But a look at the Heady financial statement, taken directly from Barclays file, will tell the true story. The totals from the Heady September 1985 financial report shows IBM as a minor customer and this is confirmed in Barclays internal writings. IBM was not the major customer. IBM was not an issue until several months after the start of this litigation.

The major customer of any construction contractor changes depending who is doing construction projects. The major customer of any contractor is the client to which that contractor has been the successful low bidder. And that relationship changes every time a new contract is bid and awarded. More important, Barclays knew that Heady was not depending on IBM, and they knew this long before mid December 1985. Furthermore why would they be willing to continue the loan, after the initial offset, if they believed IBM was crucial to Heady's success and if they knew Heady had lost IBM as a client? The answer is simple. The IBM issue is more smokescreen raised in this litigation in an effort to hide their true motives.

Barclays stated at trial the reason they were willing to continue the loans was because Heady agreed to give more collateral. The major reason for collateral is to insure payment. Barclays needed little reassurance with Heady, he was paying in advance!

The next legal argument plaintiff Barclays used at trial was they were

within their rights to call the loan as a matter of law. Barclays asserted at trial that fine points of Banking Law allow a bank to call in a loan at any time. There is a shred of truth in their arguments. The law is skewed in favor of the banks, but the law is also clear. It says if you are going to call the loan you must notify the borrower. The law does not require the borrower be given extensive notice time, but the law does state clearly the bank must notify the borrower on the same business day anytime an offset or default is declared. Barclays testimony is clear. Barclays admitted they did not notify. Their action violates Banking Law.

The reason given for the alleged default in the Summons and Complaint, was not a major issue at trial. The reason for Barclays staying away from the original complaint was simple. Barclays identified a debt that Heady had fully disclosed in his financial statements as the event of default. This issue was a family feud resulting in a legal tug of war with resulting judgements back and forth between two brothers. But, from the very beginning of the Barclays banking relationship Heady had disclosed the situation. Judgements and legal battles were disclosed on the first documents presented to Barclays from the Heady borrowers.

Toward the end of the trial the judge disclosed that Barclays held a mortgage on his home. The judge wanted to make sure this was on the record. Heady's attorney rose to his feet and acknowledged that he knew this fact. The judge said he had told the attorneys this fact in chambers. Heady's attorney further stated it was not a concern! Heady protested but was told that this was not an issue because the attorneys had made an agreement in a private conference with the judge. Heady knew nothing of any disclosure or of any arrangement.

How did a mortgage on the judges home affect the judges decision? Isn't it possible that a judge would reason that if Barclays had declared a non monetary default on the Heady defendants for not complying with their wishes, nothing would prevent them from declaring a default on the judge if he did not render the decision that the bank wanted? Would a decision against the bank cost the judge his home?

The end result of the March 1992 trial was the judge dismissed all of Heady's defenses. The judge then reserved final decision. It would not be until August that the judge would render a judgement. But something is strange. If a judge is going to render a decision based on the facts and

the testimony, wouldn't he need to review a transcript of the trial? According to post trial correspondence the court reporter never produced a transcript until March of the following year!

After the trial, in which the judge ignored the facts, Heady filed an appeal. He did this without the assistance of attorneys. On average, attorneys wanted $100,000 in retainer fees for a case estimated to exceed $250,000 in fees. Heady, unable to raise the fees needed for his defense, went to the University of Miami in Coral Gables, and Nova University in Ft. Lauderdale, to research case law. Heady and his wife then filed an pro se appeal.

During the trial Heady's defense attorney refused to present much of the evidence that had been accumulated. The legal rational was that Heady needed to preserve the evidence for a sister suit that has not yet been scheduled for trial. This sister case remains an open suit.

Although Heady felt he had been led down the wrong legal road, he was not concerned. The evidence presented at trial overwhelmingly favored Heady. Barclays admitted in testimony Heady had done everything the bank had asked of him. Heady had not missed any payments. His financial statements were solid. The trial judge simply ignored the facts and ruled in favor of the hometown attorney.

Barclays and their attorney apparently realized there were a few holes in their legal theories. In order to close up these potential faults they falsified the evidence presented in their respondent brief to the appellate court.

Barclays submitted evidence to the appellate court that was never presented to the trial court. These documents were never presented as evidence, and were never part of the trial record. Barclays simply included these documents in their briefs to the appellate court representing them to be actual exhibits as presented and accepted into evidence in the trial court!

Barclays, through their attorney, combined the front of one exhibit with the back of another and presented this new document to the appellate court as a true and correct copy of the actual evidence accepted evidence in the trial court. Heady wrote to the court and presented documentary

proof evidencing this fraud. The court returned the Heady letter and documentation. "Not admissible" Heady was told!

But Barclays action was not simply submitting additional testimony or documentation. Their altering of evidence was tampering with the court record. Barclays actions are nothing less than fraud. This fraud is a purposeful obstruction of justice. This fraud has denied Heady his rights to due process. This fraud is a criminal act. Authorities refuse to act. Why?

The Appellate courts were presented with the case and both sides had the opportunity to present legal opinions. For every allegation against him Heady presented documentary evidence, both from case law and from the banks internal files, which clearly defined Barclays' illegal actions.

Over and over again the facts were in support of Heady. The system however has little respect or tolerance for non attorneys. Pro se cases are not well received and the chances of an appellant being successful are slim. Heady however presented a case in which the appellate judges could not uphold the lower courts rulings. They had a dilemma. "What to do?" was the question. The answer was unbelievable. The Court of Appeals in New York State ruled that Heady's appeal failed on the ground that he was not lawfully entitled to present a defense without an attorney. Since Heady did not have an attorney the defense he presented was not valid. The judgement against him was upheld. The appeal was dismissed. Further denial of due process. This decision violates basic Constitutionally guaranteed rights and freedoms.

This ruling by Court of Appeals has carved out an exception to due process. If allowed to stand this decision deliverers a message to the world that the protections of the Constitution are no longer in full force and effect. As demonstrated by this case, in New York be prepared to pay an attorney. Because of a New York precedent, you no longer have the right to defend yourself!

By the time you finish reading this account you should be both outraged and encouraged. The fact that wealth buys attorneys to pervert our justice system should outrage. The fact that there are those that love our country enough to stand against injustice at any cost should encourage.

1. Heady's excellent payment record speaks for itself. Barclays agrees. Repayment was not an issue. Prior to Barclays seizures Heady had always paid his loans timely.

2. Heady never refused to pay. After the offset, Heady offered to pay in full. And that's what loans are all about. Loans are about repayment. Barclays refused payment.

3. Heady's pro se defense, Heady's right to a defense cannot be taken away by an inferior court. It is incumbent on the Supreme Court to defend and uphold those constitutional rights.

And how did Barclays respond to Heady for his prompt repayment of the loans? Here's what they did:

1. They harassed him and continually requested more and more.

2. They played a bait and switch game at a closing table and then apologized for the change from prior agreements.

3. They offset against the Heady accounts, without notice, and without a monetary default. And Barclays did this in violation of Banking Law.

4. They used a fake a court order and involved police departments in violation of law and in violation of constitutional guarantees.

5. They employed a hired gun to intimidate Heady and law-abiding citizens into consenting to the bank's demands. Heady's due process rights denied!

6. They perverted the legal system and continue to flaunt their perversion in the face of justice.

7. They wasted the courts time which further clogs an already overburdened justice system.

What then is the legal question before this Supreme Court? The question is basic. Are Barclays actions lawful and in conformance with the principles and guarantees of the supreme empowering law in our land, the US Constitution? Are the lower court decisions consistent with those lawful principles?

Barclays will point to voluminous pages of cites, statutes, so-called laws and uniform codes. For over ten years they have used this esoteric rambling to keep Heady from clearing his name. But Barclays actions were wrong, plain and simple.

By the time you reach the level of Supreme Court Judge one thing is clear. You know the law. And the law is not fair, but it is just. And Supreme Court Justices cannot possibly be intimately familiar with every statute. But every statute is not law. And the law is not as complicated as the lawyers make the public believe. The law can be very simple.

A statute or act passed by any legislative or governing body in these United States must meet an acid test to be valid. It must be in conformance with the US Constitution. Legislation enacted that does not conform to the Constitution is not valid, is not law, and is, as a matter of law, unconstitutional. And unconstitutionality dates from the time of enactment not from the date of a decision so branding it.

You can look at the US Constitution, you can search till you are exhausted, but you will never find any principle of law or any empowering language that would allow a bank to falsify a court order, rob someone at gun point, tamper with and alter exhibits entered as evidence, or any of the other things the bank has done in case at bar. Barclays and their attorneys simply believed Heady would die or fade away.

They were wrong! Here I am, warts and all!

I pray my perseverance will serve notice on Barclays and other corporate dragons that the spirit of independence to which our founding fathers pledged their sacred honor is as vibrant and alive today as it was two hundred twenty years ago! This has not been an easy struggle, but God never gives you more than you can handle.

I have discovered that the legal system is full of roadblocks, obstacles, and deliberate actions that allow those in the legal community to perpetuate ways of benefiting from the pitfalls of the system. Their gain is without regard for the victims the system is constitutionally empowered to protect. I would not wish the wrath of a wealthy litigator on anyone. But you know, absent that hostility I would not be as alive as I am today.

To many it would seem that the attorneys are the only ones that win. That's not always true. There are still enough of us who believe. And as

long as one of us lives to tell the truth, truth will survive.

The system does provide a road map, as convoluted as it may be, for those who are tenacious enough to continue in the face of overwhelming odds. So far, I have persisted. I see no reason for me to ever change.

What is this case before the court? The lawyers will tell you it is about money, payments, defaults and legal questions. Not so.
This case is about Santa Clause and a six-year-old boy.
This case is about honesty and fair play.
This case is about heritage and love.
This is about law and justice.
This case is about constitutional guarantees.
If this case were simply about money, defaults or legal questions, I would have lost the drive to continue years ago. But love knows no boundaries, has no limits and endures forever. This brief to the Supreme Court is a labor of love for our heritage, a brief thirsting for justice.

After the trial I was told by an attorney that I was a jerk for not signing anything the bank wanted me to sign. He reasoned that I had a profitable business, a beautiful home, money in the bank and I had lost everything over some stupid so-called principles. He was wrong. I have not lost everything, nor have I lost the things that are most important. Coral, William, Colleen and principles mean more to me than anything Barclays could steal. My wife and my children were a gift from God. I was not required to sign any fraudulent double talking documents to enjoy these treasures.

And because Barclays took my ability to make tremendous profits; and because they took the money that gave me an opportunity to enjoy life as I had never dreamed possible; and because of this, because of Barclays, I had the chance to slow down. And for the part Barclays played in that opportunity I say to them; thank you, thank you, thank you. And the company that Barclays destroyed had almost destroyed me. I just didn't realize it until I slowed down.

I was a rich man then and I am a rich man now. Then, I had more money than I needed. Now, I have more needs than money. At all times I had ability enough to take care of necessities.

You know when I had all that money, and all that success, I wasn't as happy as I am now. And back then I had all those bosses. You see, when you own a big company all your customers become your bosses. And all your employees become your bosses. You have to listen to them all, and make all of them happy, if you are to succeed. And too many bosses will make you dizzy. Now I only listen to one boss, Jesus. And He's a good boss.

And I'm as happy as I have ever been in my life. My wife is more beautiful than ever. My kids are healthy. I have stalked the dragon. Life is pretty good. And if it all ended tomorrow I would be in an even better place, so the bank and their hired guns don't scare me anymore!

This country began with a Declaration of Independence and a Constitution that were divinely inspired. The unalienable rights of life, liberty and the pursuit of happiness are laws of nature and of nature's God. This nation was a gift from God, to be a shinning example for the world to emulate. God has not reneged on his loan, or his promises, or his gifts. And I am grateful for what I have.

Certainly the path I have roamed is the road less traveled, but it the right road and it has been a road of scenic beauty. My adversaries probably don't have a clue what I am saying. I ask God that someday they will stand where I stand. The view is spectacular.

But now it's "D" day, decision day for the Supreme Court. On this earth, the Supreme Court is the highest tribunal one can contact. My questions to this prestigious body are: Is everything I have believed in all my life true? Is it all a lie? No disrespect intended but, yes or no your Honors? Did the blood of our forefathers buy us freedom and equal justice, or have we all been lured into a world of tyranny and economic oppression by a wealthy ruling class? Are we now living in a country where a basic right to defend ourselves can be taken away by inferior courts?

If you weigh the facts and the law as presented here Barclays V. Heady case, you can only find one way. There is no room in law, equal justice, due process, or in constitutionally guaranteed freedoms that would allow you to condone or sanction Barclays actions, or the decisions of the lower courts.

Not only should the lower courts decisions against the Heady defendants be reversed in the interest of justice, but the lower courts decision must be reversed on the ground that these decisions are not constitutionally empowered. The lower courts decisions were based on frauds presented to the courts by Barclays and their attorney. The attorneys that participated in the improper submittal should, at the very least, be sanctioned. More appropriately they should be disbarred. For equal justice they should get the same number of years in prison that I have been forced to serve in their unjustly imposed exile.

But I'm not asking for that. In fact, I am thankful to them for providing to me the opportunity to stop, look and listen. Because of them I realize how worthwhile it can be to fight for this country's principles and the right's of its citizens. And most of all I'm not asking this court for money. Money will take care of itself. God provides. I am simply asking for the court to state clearly for a new generation of Americans that some things never change. I am asking this court to confirm, through actions, that the system does work. I am asking this court to demonstrate there is equal justice under the law; as it was in the beginning, and will be at the end.

As for me, I have some things I would like to confirm, some things I believe will never change. And this brief to the court is as good a place as any to state simply:

God is alive and well;
Santa will live forever in the hearts of children;
When good people do nothing, evil prevails;
And there is equal justice, under His law.

Many years ago I was taught that you should always do the right thing, not because anyone is watching, not because you are afraid of being caught, but because it is the right thing to do and you will know what you did. And so will God.

The punishment for Barclays and their attorney has been self inflicted. They know what they have done. They live with that every day. And there will be a final judgement. And it will be just. And the facts were written at the time of the events, not a in subsequent legal brief, and not in legal double talk.

If the citizens of this country truly have a constitutional republic, they should not have to deal with the deceit and dishonesty that pervades the case at bar. A question for citizens in the 1990's and beyond is, "What kind of government are we under, and are constitutional rights still to be honored?"

I was taught to believe that equal justice existed for rich and poor alike. Equal justice under the law. I have lived my life believing. I was taught to believe the scales of justice were balanced, not heavily weighted in favor of the wealthy and powerful. I found I was very naive, but I still believed. I knew I would prevail. I believe. It's called blind faith. It is a wonderful gift.

The golden rule is alive in these United States. Unfortunately many people believe that golden rule is, he who has the gold, makes the rules. The true golden rule, to love one another, will carry you through the desert of hardship. The other gold will leave you empty and cold. For me there has often been only one set of footprints in the sands of adversity. Those were the times when faith carried me through the storm.

Money makes the world go around, the expression warns. What it too often means is, if you have a lot of it, you can go around the rules and the laws that are written for the majority. Barclays Bank and their attorney have consistently skirted the intent of the law by traveling a beltway of esoteric legalistic rambling. These distractions, caused by attorneys seduced with the lure of money, have survived ten years. Barclays flagrant abuse and misuse of our legal system has frustrated justice. My sin has been to steadfastly stand for honesty and equal justice. I will never stop. I believe the power of might is no match for the might of right.

I am sure there are countless others who have endured similar injustices in silence, afraid to speak out. I am afraid to stay silent. I am afraid that if I fail to pay the price of freedom, my children will live in a place very different from the America in which I was born, very different from the America bought with the blood of my fathers.

One of the results of the Barclays litigation is that my name is recorded in law review books of New York State. As it stands now my name is recorded for all time as a person who defaulted on his bank payments

and lost a court case. I resent that. And I know that my boss won't let that be my epitaph.

If I am to be remembered let me be remembered for things that are important. With the same reliance on Divine Providence that inspired our founding fathers I pray I am remembered;

For being vigilant,
For smiling faces,
For stalking the dragon,
For a sense of fairness,
For choosing the right path,
For one life breathing easier,
For helping a widow in distress,
For helping a friend own a home,
For helping a turtle cross a road,
For the happiness a puppy can bring,
For standing firm in what I believe to be right,
For being the one Coral chose to share her walk with.

But most of all, if I am to be remembered, let me be remembered for trying my best to follow a Jewish carpenter, from the house of David.

Respectfully Submitted: July 4, 1996
Dated

_____
Brian T. Heady

Sworn to me this 4 day of July 1996

_____
Notary Public

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The United States Supreme Court has determined rules to conclude when due process rights have been violated. In *Connecticut v. Doehr*, 501 U. S. 1 (1991) the Court resolved that a three-part test be used. In judging when a party may enlist the aid of the state to deprive another of his property by means of prejudgement attachment or similar procedure the following factors must be balanced against one another.

i. First is to determine the interest of the private party who is being harmed by the prejudgement attachment or other procedure. The greater the interference with that property right the harder it is for due process to be satisfied. In the case at bar Barclays Bank enlisted the aid of police departments to repossess collateral security. This repossession was accomplished with the assistance of the City of Poughkeepsie Police and the Town of Poughkeepsie Police. Over a quarter of a million dollars in equipment and tools was seized and sold, thus forever depriving petitioner the use of his inventory and the tools of his trade.

ii. Secondly, the greater the risk that the particular procedures being used will result in the erroneous interference with defendant's property rights, the harder it is for the procedure to pass due process scrutiny. In the case at bar Barclays relied on "what was in the banker's head at the time of seizure" as the basis for their actions. Certainly a borrower that is current in all obligations, and "showing good profits" has legal defenses that would be likely to prevail on the merits. And in the case at bar what was in the bankers head was not at all similar to the reality of what was on the petitioners balance sheet.

iii. The strength of the interest of the party seeking the prejudgement remedy is to be weighed against a defendant that would likely dissipate or conceal his assets. In the case at bar the Heady defendants had many real estate holdings, any one of

which could have satisfied the bank debt. One cannot simply conceal or dissipate real estate holdings. The risk of flight or concealment of assets was zero. Furthermore, it was never alleged that Heady's financial strength would be less than that needed to satisfy Barclays' claim. In fact, a large percentage of Heady's assets were used to secure a relatively small claim.

2. A bank account may not be attached unless the depositor is given the right to argue against the attachment either before it occurs or immediately thereafter. In the case at bar Barclays Bank attached the Heady bank accounts without prior notice. It was not until three days later, in the following month, indeed in the following year, on January 3, 1996 that Heady was notified of the account seizure. Opportunity for Heady to argue against this seizure at a trial was six years later. This is a violation of due process rights. *See North Georgia Finishing, Inc. v. Di-Chem,* 419 U.S. 601 (1975) Respondent Barclays Bank failed to meet the requirements of due process. Allowance of the writ is warranted.

3. A statue allowing a creditor to obtain repossession of goods before a hearing violates due process. In the case at bar Barclays Bank gave the impression a hearing had occurred when they issued an Order of Seizure that reportedly sanctioned the repossession. At trial it was acknowledged Barclays did not interface with either a judge or a clerk to obtain a lawfully sanctioned Order of Seizure. Barclays simply took the law into their own hands and issued a clever facsimile to deceive the police and the defendants into giving up property rights. Barclays actions relied solely on the conclusions and statements of their bank officer alleging they owned the property rights. Barclays did not interface with the judicial system. No post-repossession hearing was allowed. Respondent Barclays Bank failed to meet the requirements of due process. Allowance of the writ is

warranted. *See Fuentes v. Shevin*, 407 U.S. 67 (1972)

4. No provision for Barclays to post a bond was required. Generally, Justices have concluded that due process virtually always requires the plaintiff to post a bond or other security. *See Connecticut v. Doehr*, 501 U. S. 1 (1991)

5. Heady was not provided with an opportunity for a hearing prior to attachment. Furthermore Heady was not given notice of attachment of his accounts until well after Barclays actions and seizure.

6. The decision to make a prejudgement attachment was made in a bank meeting with the advice of the bank's legal counsel, but a bank officer not a clerk or judge made the determination to issue an Order Of Seizure. Without some interface with the judicial system due process rights were violated.

7. A detailed disclosure of the underlying facts of the dispute were not forthcoming. It was several months before Barclays particularized the reasons they relied upon for their actions. This is in violation of Banking Law, Uniform Commercial Codes and principles of due process.

8. State action was documented when the Bank delivered an Order of Seizure to both the City and Town Police Departments. The police department's participation in the events conclusively demonstrates the due process violations of Heady's property rights. *See Flagg Bros., Inc. v. Brooks* 436 U.S. 149 (1978)

9. The trial court's ruling to deny Heady testimony, the trial courts ruling to disallow Heady's expert witness, and the trials courts decision and subsequent judgement made in opposition to the testimony and documentary evidence are all violations of constitutional guarantees of equal justice.

10. The use of a firearm by a lender to force a borrower into giving up rights is an illegal collection practice. The use of a firearm in the case at bar is a criminal act under the Penal Codes and therefore a breach of the peace. Any self help repossession conducted in such a way is a violation of lawful statutes and the Uniform Commercial Code. Furthermore these actions are a violation of the due process protections of the Fourteenth Amendment.

11. A person is guilty of unlawful collection practices when, with intent to enforce a claim or judgement for money or property he knowingly sends, mails or delivers to another person a notice, document or other instrument which has no judicial or official sanction and which in its format or appearance simulates a summons, complaint, court order or process, or is otherwise calculated to induce a belief that such notice, document or instrument has a judicial or official sanction. The trial courts dismissal of this act, and the lower courts refusing to acknowledge this act as a violation of statutory and constitutional law carve out an exception to the Fourth Amendment.

12. Disallowing a jury to sit at trial is a violation of Heady's Constitutional right to a trial by jury.

13. Due process rights have been denied the Heady petitioners throughout this litigation. The trial courts refusal to

set an actual date for trial, until Statutes of Limitations precluded the criminal acts of Barclays from adjudication, is a violation of Heady's due process rights. The decision of the inferior courts, if allowed to stand, carve out an exception to due process in favor of wealthy litigators.

14. The acts by Barclays and their attorneys are so egregious as to shock the public conscience, and if given judicial sanction their acts would send a message to the consuming public that banks have a right to all of your possessions as soon as you enter into any loan agreement. Public trust and confidence in the banking system could be shattered if the wrongful decisions of the inferior courts are allowed to stand.

CONCLUSION:

Respondent Barclays Bank fails all three parts of the due process acid test.
Equal justice under the law had been repeatedly denied the Heady petitioners.
Search and Seizure protections have been trampled by the fraudulent use of an Order of Seizure.
An underpinning right to a jury trial has been denied.

It is incumbent on the United States Supreme Court to preserve protect and defend the Constitution of the United States. Allowance of the writ is warranted.

APPENDIX

Decision: Trial Court

Decision: Appellate Court

Decision: Court of Appeals

Denial: Reargument Motion, Court of Appeals

Other Material Petitioner Believes Essential:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF DUTCHESS

INDEX NO. 550/86

BARCLAYS BANK OF NEW YORK, N.A.,
Plaintiff

-against-

HEADY ELECTRIC COMPANY, INC.,
BRIAN T. HEADY and CORAL A. HEADY
Defendants

JIUDICE, J.

This action was commenced by the plaintiff on two notes against the corporate maker and two additional guarantors for the remaining principal balance due together with interest and attorney's fees as provided for in the terms of the notes.

A non-jury trial was held before this court and after the close of the evidence, the Court dismissed the first and second affirmative defenses contained in the defendants' answer since it determined that the plaintiff's agents used reasonable care in obtaining the custody of the collateral, preserving the same and in selling the seized collateral.

At the close if the evidence the Court also dismissed the fifth, seventh, eight, ninth and tenth counterclaims based upon its determination that the seizure was not illegal.

From the credible evidence adduced during the course of the trial, it is indicated that in December 1983, the corporate defendant, by its president, the defendant, Brian T. Heady, executed a secured note in favor if the plaintiff in the amount of $150,000. Heady and his wife , also a named defendant, executed a guarantee agreement in conjunction with this transaction.

The proceeds of the original note and others that followed were rolled over and eventually consolidated into a note executed on July 31, 1985. Under the terms of this note and the accompanying commitment letter, the plaintiff was allowed to declare default and accelerate repayment of the loan upon the happening of certain events which are contained in the record and need not be repeated in detail.

In December of 1985 (although interest payments were timely and the notes had not yet matured), the plaintiff deemed itself insecure

due to the financial condition and the conduct of the defendants with the result that it declared and accelerated repayment of the loan.

It is indicated that the bank reduced the outstanding principal balance due by setting off certain accounts and repossessing and selling at auction collateral belonging to the corporate defendant.

From the evidence, the Court concludes that the defendants were in default for failure to perform the acts required by the 1985 note.

More specifically, the plaintiff, by agreement, reserved the specific right to accelerate the defendants' obligations in case of default, or, if, in the opinion of the bank, the defendants's financial responsibility became impaired. Such a reservation is clear from the reading of the July 1985 note.

Additionally, the plaintiff accelerated the loans pursuant to the express terms of the Uniform Commercial Code Section 1-208.

The Court also finds that the defendants have failed to meet the burden of establishing lack of good faith on the part of the plaintiff in accelerating under the insecurity clause in the note in question.

The broad language contained in the documents permitted this plaintiff to move to protect its interest whenever it deemed itself insecure (Bankers Trust Co. V. J.V. Dowler and Co., 47 NY2d 128 [1979]).

Based on all of the evidence, the Court concludes that the plaintiff is entitled to judgement for the full amount sought.

Counsel for the plaintiff shall submit a judgement, on notice, in conformity with the terms of this decision.

Dated: August 13, 1992

_____

J. S. C.

To: Gellert & Cutler, Attys / Plaintiff
75 Market Street, Poughkeepsie, NY 12601

Hodgson, Russ, Andrews, Woods, & Goodyear, Attys/ Defendants
Three City Square, Albany, NY 12207-2884

6742q
H/hu

_____AD2d_____ Submitted - January 27, 1995

Vincent R. Balletta, Jr., J.P.
William C. Thompson
Daniel W. Joy
Anita R. Florio, JJ.

93-01673
Barclays Bank of New York N.A., Respondent, v Heady Electric Co., Inc., et al., appellants.

Decision & Order

Brian T. Heady, Vero Beach, Fla., for appellants and appellant *pro se*.

Gellert & Cutler, P.C. Poughkeepsie, N. Y. (Lillian S. Weigert and Terry D. Horner of council), for respondent.

In an action to recover on two promissory notes the defendants appeal from a judgement of the Supreme Court, Dutchess County (Judice, J.) dated August 31, 1992, which, after a nonjury trial, is in favor of the plaintiff and against them in the principal sum of $169,493.17 and dismissed the defendants's first and second affirmative defenses and fifth, seventh, eighth, ninth, and tenth counterclaims.

ORDERED that the judgement is affirmed, with cost.

On appeal from a judgement entered after a nonjury trial this court's scope of review is as broad as that of the trial court (*see, DiBruno v Abrams* 208 AD2d 672 [2d Dept., Oct. 17, 1994]). This court "may render the judgement it finds warranted by the facts, taking into account in a close case, 'the fact that the

trial judge had the advantage if seeing the witness' " (*DiBruno v Abrams, supra,* quoting *Northern Westchester Professional Park Assoc. V Town of Bedford,* 60 NY2d 492). However, a rule of restraint has arisen to the effect that the decision of the trial court should not be disturbed on appeal unless its conclusions could have been reached based upon any fair interpretation of the evidence (see, *Matter of Poggemeyer,* 87 AD2d 822, 823; cf., *Niscastro v Park,* 113 AD2d 129).

We find no reason to disturb the findings of the Supreme Court. Under the circumstances of this case an pursuant to the terms of the promissory notes in question, the plaintiff was permitted to declare the defendants in default and to accelerate the notes at will (*see,* UCC 1-208).

The defendants' remaining contentions are without merit.

BALLETTA, J.P., THOMPSON, JOY AND FLORRIO, JJ., concur.

ENTER:
Martin Brownstein
Clerk

February 27, 1995

BARCLAYS BANK OF NEW YORK N.A. v HEADY ELECTRIC CO., INC.

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty six day of March 1996

Present, HON. JUDITH S KAYE Chief Judge presiding

2-10 Mo. No. 48
Barclays Bank of New York, N.A.
Respondent,
v.
Heady Electric Co. Inc
et al., Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as Brian T. Heady seeks leave to appeal purportedly on behalf of Coral A. Heady and Heady Electric Co. Inc., be and the same hereby is dismissed upon the ground that Brian T. Heady is not the authorized legal representative of either Coral A. Heady or Heady Electric Co., Inc. and upon the further ground that Heady Electric Co., Inc. must appear by attorney (see, CPLR 321 [a]); and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied.
Judge Levine took no part.

Donald M. Sheraw
Clerk of the Court

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty eighth day of June 1996

Present, HON. JUDITH S KAYE Chief Judge presiding

2-10 Mo. No. 574
Barclays Bank of New York, N.A.
Respondent,
v.
Heady Electric Co. Inc
et al., Appellants.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is
ORDERED that the said motion be and the same hereby is denied.
Judge Levine took no part.

Donald M. Sheraw
Clerk of the Court

State of New York COURT OF APPEALS

BARCLAYS BANK OF NEW YORK N. A.

Plaintiffs - Respondent

V.

MOTION NO. 96/48

REARGUMENT
AFFIDAVIT
MOTION FOR
LEAVE TO
APPEAL

HEADY ELECTRIC CO. INC., BRIAN T. HEADY AND CORAL A. HEADY,

Defendants - Appellant

Brian T. Heady, being duly sworn deposes and says:

1. A Motion for Leave to Appeal was filed with this court on December 20, 1995.

2. This motion was denied with a decision entered on the 26 day of March 1996. The Court of Appeals decision denied the Heady defendant's Motion for Leave to Appeal on the ground that defendant's Motion was submitted by Brian T. Heady and that Brian T. Heady was not the authorized legal representative of Coral A. Heady, and further denied on the ground that the defendant corporation Heady Electric Co. Inc. must appear by attorney in accordance with CPLR 321[a].

3. Reargument of defendants appeal is asked and submitted on the ground that Brian T. Heady is in fact and is as a matter of law authorized to represent both Coral A. Heady and Heady Electric Co. Inc.

4. Brian T. Heady is, and at all relevant times during the appeal of this litigation has been, the authorized legal representative of Coral A. Heady. As evidenced by Exhibit B attached hereto, Coral A. Heady did give her husband, Brian T. Heady, the requisite authority to represent her interest in the Barclays Bank V. Heady et al. litigation. Accordingly **Brian T. Heady is the authorized legal representative of Coral A. Heady** on all matters at bar.

5. Brian T. Heady is now, and at all relevant times during the litigation with Barclays Bank has been the sole stockholder of the defendant corporation, see Exhibit C.

6. Brian T. Heady is now and at all relevant times has been the President and CEO of defendant corporation, Heady Electric Co. Inc., see Exhibit C.

7. As sole owner, and chief executive officer of the defendant corporation, Brian T. Heady has always had the requisite authority to bind the corporation to

contracts or legal settlements. Brian T. Heady is the only person authorized to represent Heady Electric Co. Inc. in the matter before the court.

8. With regard to CPLR 321[a], although this rule excepts some corporations from appearing without an attorney, a 1991 amendment, **CPLR 321:2, authorizes corporate parties to appear without an attorney**. In addition 501 of the Uniform Justice Court Act permits a corporation to appear through any authorized officer, director, or employee of the corporation provided that the appearance by a non-lawyer on behalf of a corporation shall be deemed to constitute the requisite authority to bind the corporation in a settlement or trial. The July 1, 1991 act to amend the civil practice law and rules also authorizes appearance by corporations or associations by incorporating sections 1809 and 1809-A of the New York City Civil Court Act and sections 1809 and 1809-A of the Uniform District Court Act as well as sections 1809 and 1809-A of the Uniform City Court Act.

9. In cases where there is a question the court may make reasonable inquiry to determine the authority of any person who appears for a corporation in a case. No inquiry was made in the case at bar, however, **it is**

axiomatic that Brian T. Heady, the sole owner of Heady Electric Co. Inc., the owner that also serves as the president and chief executive officer of that corporation, the same owner that bound the corporation to the loan agreements that give rise to the case at bar, **is and was at all times an owner with all the requisite authority.**

10. Reargument is further submitted on the ground that certain points may have been overlooked or misapprehended. These points are further clarified in this affidavit and motion.

11. On 2/22/96 Barclays submitted an affidavit and complained about new facts. Regardless of Barclays characterization or effort to color facts with some technicality as inadmissable, these facts are not first time assertions of new points, but rather extraordinary and compelling evidence demonstrating how the lower courts erred in their decisions. These relevant facts are an actual conversation that took place during the events that give rise to the controversy! The content of these conversations dispels any doubt that the conclusions reached at the lower court level are in error. See Exhibit A.

12. Barclays concludes their 2/22/96 affidavit in

opposition to plaintiffs motion for leave to appeal by stating that the auction complied with all requirements. However misguided this determination may be, the simple truth is any auction of equipment not pledged as collateral, or any auction of equipment seized illegally under color of law, is by law wrongful.

13. At trial Barclays defended their repossession as authorized under § 9-503 the self help provision of the Uniform Commercial Code (UCC). This self help provision is specific and requires that the repossession be made without a breach of the peace. The UCC allows a secured party to proceed with or without judicial process. In the case at bar the secured party repossessed while displaying a firearm and printed its own Order of Seizure (Exhibit D) without any interface with the court. Penal Law § 155.30 states that a person is guilty of grand larceny in the third degree, a class E felony, when "6. The property, regardless of its nature and value, is obtained by extortion"; Extortion is defined in one law dictionary as the illegal or unlawful taking of money from someone. Penal Law § 155.35 states that a person is guilty of grand larceny in the second degree "when the value of the property exceeds one thousand five-hundred dollars." § 155.40 states that a person is guilty of grand larceny in the first degree, a class C

felony, if property is obtained "by instilling in the victim fear that the actor or another person will (a) cause physical injury to some person . . . "; and § 160.10 states that a person is guilty of robbery in the second degree if he forcibly takes property when "(b) Displays what appears to be a pistol, . . . or other firearm. Robbery in the second degree is a class C felony," § 160.15 states that a person is guilty of robbery in the first degree, a class B felony, when "2. Is armed with a deadly weapon; or 4. Displays what appears to be a pistol," and § 190.50 stats that a person is guilty of unlawful collection practices "when, with intent to enforce a claim or judgement for money or property, he knowingly sends, mails or delivers to another person a notice, document or other instrument which has no judicial or official sanction, and which in its format or appearance, simulates a summons, complaint, court order or process . . . calculated to induce a belief that such notice, document or instrument has a judicial or official sanction. Unlawful collection practices is a class B misdemeanor. In the moving papers it was unrefuted and at trial it was confirmed by Barclays that their agent did use a firearm and a Order of Seizure in his collection efforts against the Heady defendants. No reasonable or fair interpretation of the facts or the law could support the lower courts decisions that this repossession was

without a breach of the peace. No reasonable or fair interpretation of the facts or the law could support the lower courts decisions that it was conducted legally.

14. In dismissing the first affirmative defense, the trial court said there was no breach of the peace. This is contrary to any logical or lawful interpretation of the evidence. Plaintiff Barclays, and their attorneys, have told differing stories and falsified the record regarding the Order of Seizure. But the simple truth is this fraudulent Order of Seizure was presented as a lawful, judicially sanctioned Order of Seizure. Barclays blatantly admitted delivering the fake Order of Seizure to the police, and as the transcript of police Sergeant Thatcher clearly states it was accepted it as a lawful judicially sanctioned Order of Seizure. The police enforced this seizure against me and enforced it against my will. (See transcript and recording of police, Exhibit A) In relevant part the transcript is clear when the police sergeant states, **"I have a copy of the Order of Seizure in front of me, right here, which authorizes the seizure."** When asked further "**Can I ask which judge signed it**?" the sergeant replied, "**We have a signature**." This misrepresentation to police, intended to trick police into enforcing a fake court order, is a breach of the peace and a violation of law, plain and simple. There is no room for anything

less than a reversal of the lower courts decision.

15. In dismissing the second affirmative defense the trial judge stated there were "three or four hundred people" at the sale of defendant's tools, inventory and equipment. This is not just against the weight of the evidence it is totally contrary to the testimony and admissions of the plaintiff. Plaintiffs ***only non party witness attending the sale,*** when required to particularize the number of people in attendance stated, "50, a hundred maybe. Maybe more." In his decision stating that "there were three or four hundred" people in the business at the auction, the trail judge increased by 800% the actual testimony at trial. Furthermore the photos taken at the auction sale confirm the non party witness testimony of less than 50. The eye of a camera does not lie. Additionally, Barclays has submitted a register in which participant bidders were required register as they entered the site of the auction. This sign in sheet records 54 bidders including representatives of plaintiff, not "three or four hundred" as the trial judge ruled. A trial judge is certainly empowered to be trier of facts, but a trial judge is not empowered to invent, alter or enlarge the facts. The lower court decision should be reversed.

16. In dismissing counterclaims five, seven, eight, nine and

ten the trial judge said that the claims were dependant on whether the repossession was conducted **legally**. Use of a document that purports to be legal process **is a violation of law**. This use of the Order of Seizure is not question to de decided by the trier of facts. Rather its use was dramatically evidenced in the documentary proof accepted by the trial court. The plaintiff freely admits this use of the Order of Seizure at trial. Additionally, as can be seen from the testimony and the transcript of Sergeant Thatcher of the Poughkeepsie Police Department, the fraudulent "Order of Seizure" was delivered to police departments, and was accepted as valid, lawful, and judicially sanctioned. The fake Order was enforced as if it had the full authority of a judicially sanctioned order. **There is no question of fact as to the illegal nature of this action by Barclays Bank.** Barclays Bank **did not** conduct the repossession **legally**.

17. Barclays' admission that their agent used a gun in his repossession procedures is, without any doubt, an admission of a breach of the peace. For any court decision to discount the use of a firearm by anyone other than the police is incredible on its face, and chilling in its potential consequence. Rules of order are trashed by this lower court president setting decision. To uphold this method and use of a gun

would carve out a special exemption to due process and constitutionally protected rights of citizens to be safe and secure. New York residents deserve better than a system where money buys hired guns to Gestapo its citizen's businesses.

18. In the plaintiffs' respondent brief attorney Weigert included a letter to allegedly show that Brian T. Heady had a vendetta against her law firm and further used this letter to demonstrate the defendants were living comfortably in Florida. But how comfortably defendants are living is not the issue. The perceived vendetta is in reality a absolute conviction that our founding fathers put enough checks and balances into our system to prevent the flagrant abuse of our legal system that Barclays has demonstrated in the case at bar. The perceived vendetta is in reality a determination to take whatever course of action necessary to bring justice to the Barclays V. Heady litigation. If this requires a fight all the way to the United States Supreme Court so be it. If it requires that I go to the court of public opinion in a book or other media, I will also do that. I will never stop until justice prevails. I will not sit idly by or allow unchallenged this president setting decision in which the lower courts have carved out special exceptions in favor of rich banks that hire unscrupulous attorneys.

19. Further plaintiff's submission of a letter dated three years after the trial, and more than 10 years after the events that give rise to the dispute, is what it is. Its use was intended to poison the court against the appellant-defendants. But no defense or explanation need be given to a letter born of frustration, caused by the misuse of the legal system by Barclays and their corrupt attorneys. Indeed it is the wrongful actions of attorneys such as the ones representing Barclays that have jaded public opinion of the courts. To allow this misuse of the civil justice system to continue would only serve to further deteriorate public trust and confidence in the judicial system. It is incumbent on the appellate court to dispense justice and find in favor of the appellant defendants.

20. The book referred to in the letter is a manuscript showing how Barclays and their attorneys have used machinations that are reminiscent of an ancient art form. If an artist paints a portrait and then stands back and realizes it does not appear as intended, the artist can simply repaint over the old portrait to hide the original. Such is the case at bar. The original letter notifying Heady Electric of acceleration was flawed. Barclays painted over this picture by serving Heady defendants with a Summons and Complaint. This too was flawed so Barclays filed an amended complaint.

After finding that this too contained errors and omissions fatal to a legitimate, successful defense they tried to paint a different picture at trial. Finally when faced with the transcript from the police conversation Barclays used a letter to another attorney in a different case to try to paint the Heady defendants as having a vendetta and further paint them as having little esteem for the Poughkeepsie legal community. This is a transparent attempt to again repaint the original portrait.

21. In the beginning, on December 31, 1985 Barclays offset against the Heady Electric accounts. Banking Law 9-g states; "No banking institution **shall** assert, claim or exercise any right of set off **unless prior to or on the same business day** of such action, notice of the set off together with the reasons for the set off are mailed to the depositor." (It should be noted that the draftsmen used the word shall) Barclays by their own admission, as well as the confirming US postmark, admit that the notice was not sent on the same day as the law requires. It was not even sent in the same month. (See Exhibit E) This notice postmarked January 2 also fails to meet the legal requirement stating the reasons for the set off. Several days later, when the threat of a lawsuit from defendant became a possibility, Barclays painted another picture over the

legally deficient notice. They served Heady Electric with a Summons and Complaint. This notice although deficient in the timeliness, met the legal requirement of notifying the defendant of the reason for the set off. This Summons and Complaint particularizes the reason as "8. An event of default has occurred in that on November 27, 1985, a judgement in the amount of $48,830.11 (Dutchess County Index No. 1985/3150) was entered against Brian T. Heady, a guarantor of the Note." This debt however was disclosed to the bank in all financial statements dating back to 1983. Barclays entered into the loan agreements with Heady Electric with full knowledge of this debt. This debt was a satisfactory risk or Barclays would have never consented to numerous loans. The lower courts ruling that the plaintiff bank deemed itself insecure due to this allegation flies in the face of the fact that the bank had prior knowledge of the debt. For the court to search for a default rational other than the default the bank particularized is in opposition to Banking Law requirements that the reason be made know to the depositor on or before the business day of offset. If it is not in writing you can't got to court to enforce it, and there is no other reason identified, in writing, as required by law.

22. The trial court "From the evidence the court concludes

that the defendants were in default for failure to perform the act required by the 1985 note." The note required one payment in March of 1996. Barclays offset three months prior to the due date. Additionally it should not go unnoticed that defendants had been paying in advance and at the time of offset was prepaid in an amount exceeding $40,000.

23. In the lower courts ruling the judge stated that "In December of 1985 (although interest payments were timely and the note had not matured), the plaintiff deemed itself insecure due to the financial condition and the conduct of the defendant with the result that it declared and accelerated the repayment of the loan." But a clear statement of defendants financial condition is found in Barclays loan officer's internal writings. "In the meantime, subject corporation is showing good profits" can be found in a year end report singed off by three different bank officers.

24. The loan documents and the UCC § 1-208 give the right to accelerate as stated in the Appellate decision and ruling. But there is more. The UCC continues; this "shall be construed to mean that he shall have the power to do so only if he in good faith believes that the prospect of payment or performance is impaired." Clearly from the evidence and admissions by Barclays

the borrower was $40,000 ahead of the payment schedule. It is impossible that a fair interpretation of the evidence could conclude that a bank would in good faith declare a borrower showing good profits and paying in advance to be in default.

25. Additionally, as has been amply demonstrated, the borrower complied with the requirements of the note. In relevant testimony the loan officer makes the admission that Heady had met the requirements. *Q. So, isn't it true that what had been requested or required of Brian in the July 19th, 1985, commitment letter, which is plaintiff's exhibit 17 in evidence, that a hundred thousand dollar collateral security mortgage be granted on 311 and 311A Church Street, had in fact happened? A. Yes it had.* Therefore the only conclusion, based on a fair interpretation of the evidence and admissions of by the plaintiff bank, is that the prospect of payment from a borrower paying in advance is good, and Heady's performance on other conditions had in fact happened! The truth is that the bank has tried to paint a picture of financial failure and non performance, however the underlying portrait is one of financial stability, prepayment not late payments, and adherence to the conditions of the loan.

26. The lower courts' rulings were contrary to the

admissions of the plaintiff, contrary to the evidence provided, contrary to UCC requirements, contrary to banking law, contrary to penal law, contrary to the agreements contained in the loan documents and contrary to the principles of equal justice under the law. The appellate court erred in its decision. Defendants - appellants motion to reverse the lower courts rulings should be affirmed.

27. In summary when I first entered into a loan agreement with Barclays, I asked what all the small print meant. I was told the short version is always pay your payments and you will never have to worry about anything else. I kept my promise to pay and gave the bank everything they wanted at the time we entered into a contract. The allegation of default is esoteric legal rambling of a bank trying to defend indefensible actions. These events are the actions of a malicious banker intent on forcing her will on a borrower, and the actions of an attorney skilled at creating a legal quagmire sufficient to confuse the lower courts.

WHEREFORE, the appellant - defendant begs this court to right the injustice of years of abuse of the legal system. The defendants motion should be granted, or at the very least a new trial ordered based on the relevant transcript of the

police. Defendants respectfully beg this court to award defendants the full damages sought in the verified answer with counterclaims. The defendants again implore this court to seize this opportunity to demonstrate the wheels of justice may turn slow, but the scales of justice eventually prevail. Motion by defendants should be granted completely, and should be granted expeditiously.

Dated April 23, 1996

Vero Beach, Florida

_____

Brian T. Heady

Sworn to me this 20 day of April 1996

_____

EXHIBIT A

Thatcher: Town Police, Sergeant Thatcher.

Heady: Yes Sergeant Thatcher, this is Brian Heady. I'm with Heady Electric Co., in Poughkeepsie.

Thatcher: Um hum.

Heady: We're doing a job at the Ramada Inn, a construction project.

Thatcher: Ok.

Heady: We got a telephone call here a little while ago, that our trailer, our job trailer was missing. Sent a man down to the job. He went down, and he looked. The electrical service has been cut loose. The trailer is gone.

Thatcher: Hold on a second, OK?

Heady: Sure.

Thatcher: Ok, I'm back.

Heady: Um, the trailer is gone, the equipment inside is with it. The trailer has a net worth of about $5,000. The equipment inside, all totaled including desk, equipment, etc. was about $15,000.

Thatcher: Ok.

Heady: The damage done from, from cutting loose is probably another $1,000. So its about a $21,000 deal, I would guess.

Thatcher: Ok.

Heady: I should tell you, before, before we send a lot of

um, officers, and, and have your people scratching your heads, I should tell you that the, it would not surprise me to find the equipment at Empire Recovery,

Thatcher: Um hum.

Heady: Um, seized by Barclays Bank. I should also tell you, that unless they have the proper paper work, to uh make, to make that uh, court orders, that I, um, will sign any warrants, any arrest warrants, or anything else that you want me to sign.

Thatcher: Ok.

Heady: And I should also tell you that I doubt very seriously that they have the correct paper work.

Thatcher: OK. Anything else?

Heady: Nope, that's, that probably about does it.

Thatcher: Ok. Whom am I speaking to again?

Heady: This is Brian Heady.

Thatcher: Ok, Brian. I have an Order of Seizure in front of me.

Heady: You do have, Ok.

Thatcher: I wanted to make sure I got all the information first before I told you.

Heady: Ok.

Thatcher: At 1:30 this morning, you were correct, Empire Recovery did, uh seize the trailer, and uh, Empire

Recovery up on the, up on the north end of town,

Heady: Uh huh.

Thatcher: For Barclay Bank, and I have the Order of Seizure, copy of the Order of Seizure of Seizure in front of me right here.

Heady: I see.

Thatcher: Which authorizes them to seize it.

Heady: I see. Can I have a copy of that?

Thatcher: Um, why don't you check with Barclay Bank and see if they'll give you a copy first. I don't know if I can give a copy.

Heady: I can tell you they will not.

Thatcher: Ok. I don't know if I'm authorized to do that. But uh, if it falls within the Freedom to Information Act you can come up to the police Station here and fill out the request form and then our legal people here in the Town can research it and see if your, you know this copy is available to you or not.

Heady: Uh huh. Alright, well I would, I would guess that if...

Thatcher: Probably be easier to get it from either Empire Recovery or Barclay Bank than to try to get it from us, cause I, again, I don't know if this is able to be released by us. Cause it's really not a form that is part of our records.

Heady: Well, can I ask what judge signed it?

Thatcher: Lets see here. Repossession authorized by ... There's a signature here. Um, it says it authorized by a.. Let me try to make it out. Again this might only be one half of it, Ada Schroeder?

Heady: I see. I see. Ok. The uh, and it's an Order of Seizure?

Thatcher: Yes an Order of Seizure dated January 24th 1986.

Heady: Uh, huh.

Thatcher: And Empire Recovery was the one. And I can't see any more information on here. Uh, it says the debtor named above whose last known address is RT 9 Poughkeepsie is in default in the amount of $188,000.

Heady: Uh huh.

Thatcher: That is all I can make out on this thing. It just describes the trailer, that's all.

Heady: Yea. Ok, very good. I'll be up to sign whatever necessary forms to get a copy of that.

Thatcher: Ok. Again, try them first because, probably for your, for your sake it'll be easier to get it through either Empire, the Barclay Bank or through um ...

Heady: Well, even so I would still, I would still to want see, I still want a copy of what you have.

Thatcher: Ok, well then come on up, fill out that form, and I'll let you know if uh, if its able to be released.

Heady: Alright, and who should I ask for?

Thatcher: Just come in to the front desk and we'll, we'll straighten you out from there.

Heady: Good. Thanks. Have a nice day.

Thatcher: You too.

EXHIBIT B

State of New York COURT OF APPEALS

BARCLAYS BANK OF NEW YORK N. A.

Plaintiffs - Respondent

V.

AFFIDAVIT TO AFFIRM
POWER OF ATTORNEY

HEADY ELECTRIC CO. INC., BRIAN T. HEADY AND
CORAL A. HEADY,

Defendants - Appellant

CORAL A. HEADY, being duly sworn deposes and says:

1. I am party to the above captioned litigation, and am familiar with the facts of the case.

2. At all relevant times during this litigation I have relied on Brian T. Heady to represent my interest in all matters that pertain to this litigation.

3. All defendants were represented by council at the Supreme Court level. Brian T. Heady has represented my interest in all subsequent appeals.

4. I have granted Brian T. Heady Power of Attorney with regard to this and any other litigation in which I am a defendant or a plaintiff and that authority remains in full force and effect.

5. The courts ruling that Brian T. Heady is not my authorized representative is not correct. He has all of the requisite authority and legal power to represent me or bind me to any settlement.

Dated April 23. 1996

Vero Beach. Florida

_____

Coral A. Heady

Sworn to me this 24 day of April. 1996

_____

Notary Public

EXHIBIT C

State of New York COURT OF APPEALS

BARCLAYS BANK OF NEW YORK N. A.
Plaintiffs - Respondent

V.

AFFIDAVIT TO AFFIRM
POWER OF ATTORNEY

HEADY ELECTRIC CO. INC., BRIAN T. HEADY AND CORAL A. HEADY,
Defendants - Appellant

BRIAN T. HEADY, being duly sworn deposes and says:

1. I am President and only stockholder of Heady Electric Co. Inc., a party to the above captioned litigation, and I am familiar with the facts of the case.

2. At all relevant times during this litigation Heady Electric Co. Inc. has relied on Brian T. Heady to represent the corporation's interest in all matters, including those that pertain to this litigation.

3. All defendants were represented by council at the Supreme Court level, however it was Brian T. Heady that represented the corporation in the subsequent appeal, and it was Brian T. Heady that made all corporate decisions during that time. Furthermore, it was Brian T. Heady that negotiated the contracts and terms of the notes with Barclays Bank that give rise to this dispute.

4. The corporation has granted Brian T. Heady complete authority to represent its interest with regard to this and any other litigation in which the corporation is a defendant or a plaintiff. That authority remains in full force and effect.

5. Brian T. Heady has all of the requisite authority and legal power to represent or bind Heady Electric Co. Inc. to any settlement.

Dated April 23, 1996
Vero Beach, Florida

Brian T. Heady, President Heady Electric Co. Inc.

Sworn to me this 23 day of April 1996

Notary Public

EXHIBIT D

BEST AVAILAB

DEFENDANT'S EXHIBIT

PLAINTIFF'S EXHIBIT 1
CASE NO.
FOR IDENTIFICATION
DATE 8/7/89 INITIALS LJS

Barclays Bank
Lender
against
Heady Electric Inc. & Brian Heady
Borrower

Control No.

Order of Seizure

Date 1-14-86

STATE OF NEW YORK, COUNTY OF Dutchess

We being the appointed agents for the lender, being duly sworn, depose and say:

1. That deponent is the agent herein and makes this affidavit to recover the chattels described below.
2. That that plaintiff is entitled to the possession of the said chattel (s).
3. That the said chattel or chattels are wrongfully held by said defendant.
4. That this seizure is authorized under section 9-503 of the U. C. C.
5. The following is a list identifying each chattel to be seized.

Year all accounts receivable, all inventory, and fixtures and two IBM PC and attached list.
Model _____ Color _____
Serial# _____
Plate# _____

Be it known that:

EMPIRE RECOVERY, INC. acting as the assigned agent of the lender whose interest in above collateral is described in the terms of a conditional sales contract. (Chattel Mortage or Security Agreement) which they hold. And that the lendor is seeking relief under the terms of U. C. C. and by virtue of a self help repossession.

Be it also known that:

The Debtor named above whose last known address is 311 Church St., Poughkeepsie, NY

is in default in the amount of 187,526.00. Debtor is contractorially bound to surrender over above property to holder of this order.

REPOSSESSION AUTHORIZED ON SIGHT
REPO AND
ACCEPT NO FUNDS

Control No.

COUNTY OF

Police Agency Receiving Report

Date Time

Officers Name

Signature

Undertaking
TO SEIZE CHATTELS

Agent for Lender
Form Prepared by
Empire Recovery Inc.

I approve of the within undertaking, and of the sufficiency of the sureties therein named.

Approving Agent

LE COPY

BARCLAYS BANK OF NEWYORK, N.A.
Market Street Branch
17 Market Street
Poughkeepsie, New York 12602
Telephone 914-471-8833

December 31, 1985

RECEIVED JAN 0 3 [illegible]

Mr. Brian Heady, President
c/o Heady Electric Co., Inc.
311 Church Street
Poughkeepsie, NY 12601

Dear Mr. Heady:

This is to inform you that we have today accelerated your loan(s) here. Therefore we have exercised our right of offset and today applied the balances in your accounts against your loan #6012425.

Very truly yours,

Ada Schroeder
Vice President & Corporate Manager

AS:lf

Enclosures - 3 debit memos

EXHIBIT E

BARCLAYS

BARCLAYS BANK OF NEW YORK, N.A.
Market Street Branch
17 Market Street, Poughkeepsie, N.Y. 12602-0711

FORT ERIE JAN 2'86 ONT

22

Mr. Brian Heady, President
c/o Heady Electric Co., Inc.
311 Church Street
Poughkeepsie, NY 12601

PLAINTIFF'S EXHIBIT

F 01520

No. 96-816

(2)

Supreme Court, U.S.
FILED
DEC 23 1996
CLERK

IN THE

Supreme Court of the United States

October Term, 1996

BRIAN T. HEADY, *et ux.*, aka HEADY ELECTRIC CO.,

Petitioner,

against

BARCLAYS BANK OF NEW YORK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEALS,
STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GELLERT & CUTLER, P.C.
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Question Presented

1. Whether this Court has jurisdiction to consider Petitioner's arguments and whether the writ of certiorari should be denied since:

   (i) No federal question is presented and there is no decision on the merits by New York State's highest Court; this is a properly decided state law case of default and collection of a bank loan;

   (ii) Appellant lacks standing to assert and represent the claims of other necessary parties;

   (iii) Appellant did not comply with this Court's letter directive, dated October 10, 1996; and

   (iv) Appellant omitted and misstated pertinent record facts, prior proceedings and governing state law statutes and cases in the petition?

Statement Pursuant to Rule 29.6

A listing of parent companies or non-wholly owned subsidiary companies of respondent, Barclays Bank of New York, N.A. is set forth below:

Barclays PLC
Barclays Bank PLC
Barclays Corp.
Fenchurch Corp.
Baroreo I Corp.
Baroreo II Corp.
Barclays New Jersey Corporation
Baroreo Lloyd Corp.

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A. Barclays Bank Of New York, N.A., v. Heady Electric Company, Inc., *et al.*, 174 AD 2d 963 (3d Dept.), appeal dismissed, 78 NY 2d 1072 (1991) A1

B. Statement Of Questions Presented To The Appellate Division By The Heady Defendants On Appeal From Judgment, Resulting In February 27, 1995 Decision And Order (See A. App. 3) A7

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Rowland v. California Men's Colony, 506 U.S. 194 (1993) 9

Winfield v. Society Nat'l. Bank, 845 F.2d 328 (6th Cir. 1988) 10

Yee v. City of Escondido, 503 U.S. 519 (1992) 10

Statutes Cited:

28 U.S.C. §1257(a) v

Uniform Commercial Code 9-503 ..... 6, 10

Statement of Jurisdiction

This Court does not have jurisdiction over this matter, 28 U.S.C. §1257(a). No federal question is presented, and in any event, the purported federal questions were neither presented nor passed upon during the state court trial and appeals on the merits.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Barclays Bank of New York, N.A. ("Barclays") respectfully requests the Court to dismiss or deny the petition for writ of certiorari to review an order dated March 26, 1996, which dismissed a motion for leave to appeal to the New York Court of Appeals against Heady Electric Co., Inc. ("HEC") and Coral A. Heady and otherwise denied the motion as to the remaining appellant, Brian T. Heady, as well as the June 28, 1996 order denying reargument of such motion.

STATEMENT OF THE CASE

A. Decisions and Opinions Below

The order of the New York Court of Appeals, dated March 26, 1996, dismissed a motion for leave to appeal as to HEC and Coral A. Heady on the grounds that Brian T. Heady is not an attorney and was not their authorized legal representative and upon the further ground that HEC, a New York corporation, must appear by attorney. As to Brian T. Heady, without reaching the merits, leave to appeal was summarily denied (A. App. 4).

The order of June 28, 1996 (A. App. 5) denied a motion for reargument of leave to appeal and likewise did not address the merits.

The decision and order of New York's Appellate Division, (Second Judicial Department), which the Heady appellants attempted to bring on appeal to the New York Court of Appeals, is dated February 27, 1995 (A. App. 3-4). It is a unanimous affirmance of a judgment against HEC, the borrower, and Brian T. Heady and Carol A. Heady, guarantors, entered after a non-jury trial to recover on promissory notes. No federal constitutional issue was raised by the Heady defendants in the six

questions submitted on the appeal to the Appellate Division. (See the Heady defendants' Statement of Questions, Respondents A-7.)

The decision following trial, dated August 13, 1992, is reproduced at A. App. 1-2. As can be seen, no constitutional question was raised or decided at trial.

Further, before trial, there was an interim appeal with respect to the issue of waiver of jury trial, among other things. This decision is reported at *Barclays Bank of New York, N.A. v. Heady Electric Co., et al.*, 174 A.D.2d 963 (3d Dept.), *appeal dismissed*, 78 N.Y.2d 1072 (1991). No constitutional questions were raised on this appeal; rather, the issue was whether the borrower and guarantors had *knowingly* waived the right to jury trial by contract.

In particular, the Appellate Division examined each of Heady's contentions as to the enforceability of the jury waiver (none of them constitutional) and ruled that:

> Between December 1983 and July 1985, Heady executed six secured notes and two personal guarantees in connection with the funds and line of credit extended to his company by plaintiff. Each of these documents contained a clause waiving the right to a jury trial in any litigation where plaintiff was an adverse party. In opposing plaintiff's motion to strike, however, [the Heady] defendants argued that Heady was allegedly unaware of the waiver provisions in the documents and, therefore, should not be bound by them. Supreme Court denied plaintiff's motion, ruling that the waiver provisions in the various notes and agreements were ineffective. We disagree. As a general proposition, contract

> provisions waiving a jury trial are valid and enforceable, unless adequate basis to deny enforcement is set forth by the challenging party . . . The right to a jury trial may even be waived in an instrument other than that . . . representing the agreement upon which the action is founded. Here, defendants have set forth no adequate basis to set aside the waivers.

The court continued:

> Heady testified that either he or his attorney read all documents to be signed. Moreover, even if Heady had neglected to read the documents containing the waiver provisions, this alone would not affect their validity . . . Although defendants contend that the waivers were actually buried in the small print of lengthy documents, a review of these papers reveals that each of these documents is only one page long and the waiver clause, printed in the same size type as the rest of the document (see supra), appears only a few lines above Heady's signature. Accordingly, defendants' claim that the waiver provision was hidden in the various agreements lacks merit . . . (citations omitted), Id. at 965 (Respondent's A-1).

As can be seen, no state court below was presented with nor passed on a federal question.

B. Course of Proceedings and Disposition of the Case Below

Petitioner, Brian T. Heady, seeks to prolong this torturous eleven year state court contract litigation by, at this late date, attempting to interpose constitutional claims that were never

timely or properly presented or passed upon, and which are without foundation, rest on obviously false assumptions, and have been explicitly foreclosed by previous decisions of holding self-help repossession to be constitutionally valid.

This was a suit to collect on two promissory notes, brought by Barclays against HEC and the two individual guarantors, Brian T. Heady and Coral A. Heady, for the remaining principal balance due of approximately $169,000.00, plus interest and attorneys' fees pursuant to the terms of the notes and guarantees.

Between December 1983 and July 1985, the Heady defendants executed *six* secured notes and *two* personal guarantees in connection with the funds extended by Barclays. *All* of these transactions expressly provided that Barclays was allowed to declare a default and accelerate repayment of the loan upon failure of either monetary or non-monetary provisions of the parties' agreements, or in the event Barclays deemed itself insecure. Mr. and Mrs. Heady and HEC were represented by counsel in their transactions with Barclays; indeed that attorney testified at trial.

In December, 1985, Barclays declared a default and accelerated the notes because of HEC's failure to comply with non-monetary terms of the notes and because Barclays deemed itself insecure. Significantly in November, 1985, the bank had learned that HEC's real estate collateral to Barclays was in foreclosure by *another party*. Although Carol A. Heady owned other real estate and multiple closings were scheduled, Brian T. Heady would not permit replacement of real estate collateral to take place. A promised equity infusion of $100,000 into HEC had not been made. HEC had lost its primary source of business, International Business Machines Corp. ("IBM"). A substantial judgment of $48,830.11 had been entered against Mr.

Heady by his brother in late November 1985. Pertinent business and financial information had been withheld from Barclays. At trial, these facts were confirmed, not only by a bank officer, but by non-party witnesses and the Headys' *own* accountant, lawyer and previous major customer, IBM.

When Barclays, on at least three occasions, offered to continue financing HEC so long as, at a minimum, it provided adequate replacement real estate collateral (which Carol A. Heady owned), defendants did not accept such offers--determining instead to simply let the business go. The Headys' attorney stated at trial that he had understood the risks and explained them to Mr. Heady. Barclays reduced the indebtedness by setting off HEC's accounts maintained at Barclays and repossessing and selling at auction HEC property pursuant to the parties' agreements.

The trial judge and appellate court relied on the ample documentary evidence and credible testimony to establish that the Heady defendants were in default of their notes and guarantees and that the repossession and sale of collateral conformed to the parties' agreements and applicable state law, the points raised and passed upon below.

C. Correction of Misstatements in the Petition

Decisions of the trial court and the Appellate Divisions correctly set forth the pertinent facts of this case.

Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of facts contained in the petition to the Court's attention. These points are addressed to set the record straight—none of these points, even as misstated in the petition, confer jurisdiction.

Petitioner misrepresents that the self-help commercial repossession was conducted under a falsified court order. Mr. Heady raised this wild claim at trial and on appeal to the Appellate Division as a matter of state law. His contention was rejected. The private document of seizure states on its face that the repossessor is acting at the request of the lender to repossess the collateral pursuant to agreement. It further states that:

1. the seizure is authorized by Uniform Commercial Code ("UCC") 9-503;

2. the seizure is pursuant to self-help repossession (not court directed); and

3. that the party is contractually bound to surrender the property.

The repossessor also handed Brian T. Heady copies of the underlying security documents and did not say it was a court order. He advised Mr. Heady to call an attorney, which Mr. Heady did several times.

Mr. Heady also misrepresents that the police participated in the repossession or were somehow tricked by Barclays. To the contrary, a private repossession service performed the repossession as an independent contractor for Barclays. There was no testimony by any police officer at trial, let alone that a police department was "tricked" into permitting the repossession. There was no testimony that the police ever mistook the repossession document for a court order. The repossessor did advise local police that a self-help repossession was scheduled.

In this regard, the transcript of a purported conversation between one Thatcher and Heady, attached as Exhibit A to the

affidavit of Brian T. Heady, April 20, 1996 (Appellants' Appendix) was neither proffered nor admitted in evidence. Thatcher was not called as a witness. In any event, in the transcript, Thatcher does not state that the document was signed by a judge, or that he was "tricked".

Indeed, when Mr. Heady called the police to ask the repossession service to leave, that is exactly what happened—they left. The trial judge noted this. Further, Mr. Heady as his own testimony showed at trial, helpfully pointed out to the repossession service what collateral was covered by Barclays' security agreements and participated in the process.

It is true that the head of the repossession company was licensed to and did carry a firearm. There was no false showing of authority, such as a badge, in connection with the weapon. Indeed when asked, he explained it was regular procedure to protect the collateral. No criminal charges were brought against the repossession company or Barclays.

Defendants asserted below, as matters of state law, that the repossession service's use of a piece of paper prepared by the repossession service and authorizing it, as recovery agent to conduct the seizure, constituted a crime, violated the UCC and along with other alleged (but not proven) conduct, constituted a breach of the peace.

In dismissing such claims on the *facts* under New York law, the trial judge held there was no breach of the peace and specifically noted:

> The fact that [the repossessor] had a piece of paper that said order of seizure, the fact that he had a gun—the gun wasn't used to threaten anybody, Mr. Heady did have

> access to his attorney, he couldn't get, certainly he could have got him by the next day or even the day after because this took place over three days, and it was by the third day Mr. Heady then closed down and asked Mr. Simoniette to leave, and what did Mr, Simoniette do? He left. There wasn't any trouble. When Mr. Heady said get out, he went. So, I don't understand and do not feel that these four counterclaims can survive when they all are dependent upon whether or not illegal means were used to repossess the items. *The court determines as an issue of fact these items were not repossessed illegally*, and therefore, counterclaims seven, eight, nine and ten are dismissed, and you have an exception to the court's ruling [emphasis added].

The petition also misrepresents the facts as to the lack of adequate collateral. Indeed, critical to defendants' uncontradicted default and Barclays' decision to accelerate and setoff was defendants' failure to provide adequate collateral. Meetings and phone calls took place in the Fall of 1985 due to Barclays' concerns about the status of the loan. Certain property, which was to have secured this loan, was in foreclosure and the loss of real estate collateral was not resolved by the Heady defendants. A prior lien on property had not been released. No closing of replacement security occurred. The July 31, 1985 note matured on March 31, 1986; Barclays was not paid by the borrower. Indeed, no tender of payment was made. In addition, contrary to the assertions in the petition, no order of attachment was sought or required, and all state courts had the required and complete evidentiary records before them.

REASONS FOR DENYING THE WRIT

I

This Court Has No Jurisdiction to Consider Petitioner's Arguments

No federal question was raised in the pleadings, at trial, or in the two appeals to New York's Appellate Divisions, which were the only state appeals to decide issues on the merits. When the Heady defendants attempted to reach the New York Court of Appeals, their requests to do so were declined. That Court has never ruled on the merits of the case.

There is only one petitioner here, Brian T. Heady as explained at page ii of the petition. Carol A. Heady does not appear *pro se* within the text of the petition and does not have counsel of record. Petitioner Brian T. Heady is not an attorney and cannot represent another purported party. Likewise Heady Electric Co., Inc., a New York corporation, may not appear in federal court other than through a licensed attorney, *Rowland v. California Men's Colony*, 506 U.S. 194 (1993) (corporations may not appear in federal court other than through a licensed attorney); *Carden v. Arkoma Associates*, 494 U.S. 185 (1990) (persons represented by a corporate name can appear only by an attorney —they are not really parties to the suit).

Further, when the New York Court of Appeals dismissed the Heady defendants motion for leave to appeal, insofar as Brian T. Heady purported to bring the motion on behalf of Carol A. Heady and HEC, it grounded its decision on the fact that HEC, as a corporation, did not have counsel as required under New York law and that Mr. Heady, who is not an attorney, could not represent Mrs. Heady.

Here, of course, Mr. Heady also cannot assert the purported legal rights of other necessary parties. In this regard, by letter dated October 10, 1996, the Office of the Clerk of this Court reminded Mr. Heady that "it does not appear as though you are a member of the bar of this court, therefore you may not represent a company or corporation in this Court".

No federal question was either raised or decided on the merits in any court below. Nowhere in appellant's papers does he specify the portions of the record, in the court of first instance or on appellate review, where the purported federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts. This is because such review did take place. Indeed, questions 5, 6 and 7 of the petition only serve to confirm this, namely, that as stated by petitioner, only state law questions are raised.

Therefore, the petition should be dismissed, *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing state court judgments, the court refuses to consider claims that were not raised or addressed below).

Further, private self-help repossession under UCC 9-503 has consistently been held to be constitutionally sound, *Winfield v. Society Nat'l Bank*, 845 F.2d 328 (6th Cir. 1988); *Adams v. Southern California First Nat'l. Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. den.*, 419 U.S. 1006; cf, *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

II

In Any Event, New York State Law Was Correctly Applied

As the trial court found upon review of the credible evidence and the Appellate Division unanimously affirmed, the notes and guarantees were in default and the repossession and public auction sale fully complied with the contracts and state law requirements.

The New York courts correctly applied New York commercial law, on the facts of this case, as shown in the decisions below.

Conclusion

For all of the foregoing reasons, the petition should be dismissed, or the writ of certiorari denied.

Respectfully submitted,

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Appendix A—*Barclays Bank of New York, N.A. v. Heady Electric Company, Inc., et al.*, 174 AD 2d 963 (3d Dept.), appeal dismissed, 78 NY 2d 1072 (1991

(963) 17 *Barclays Bank of New York, N.A.*, Appellant, v *Heady Electric Company, Inc., et al.*, Respondents.—Harvey, J. Appeal (transferred to this court by order of the Appellate Division, Second Department) from an order of the Supreme Court (Jiudice, J.), entered September 5, 1990 in Dutchess County, which *inter alia,* partially granted plaintiff's motion for summary judgment.

On December 30, 1983, defendant Heady Electric Company, Inc., by its president, defendant Brian T. Heady (hereinafter Heady), executed a secured note in favor of plaintiff in the amount of $150,000. Heady and his wife, defendant Coral A. Heady, also executed a guarantee agreement in conjunction with this transaction. The proceeds of this note and the others that followed were rolled over and eventually consolidated in a note executed on July 31, 1985 in the amount of $340,130. Under the terms of the note and the accompanying commitment letter, plaintiff was allowed to declare default and accelerate repayment of the loan upon the happening of certain specified events. In December 1985, although interest payments were timely and the notes had not matured, plaintiff deemed itself insecure due to the financial condition and conduct of Heady and his company, declared default and (964) accelerated repayment of the loan. In an attempt to reduce the outstanding principal balance due on the notes, plaintiff set off certain accounts and repossessed and sold at auction the collateral belonging to Heady's company.

Plaintiff commenced this action in January 1986 seeking to recover the outstanding balance due on the loans, amounting to approximately $185,000. Defendants answered and asserted 11 counterclaims and three affirmative defenses. These counter-

claims and defenses chiefly concerned allegations by defendants that plaintiff acted improperly in seizing and disposing of defendants' collateral and assets following plaintiff's declaration of default. Defendants also sought $1,487,000 in actual damages and $50,000,000 in punitive damages. In November 1989, plaintiff moved for summary judgment dismissing defendants' affirmative defenses, counterclaims and claims for punitive damages, and, further, brought a separate motion to strike defendants' demand for a jury trial on the basis that defendants had allegedly waived that right. Supreme Court denied plaintiff's motions in all respects except that the court dismissed the individual claims for punitive damages. Supreme Court did, however, leave the request for punitive damages in the ad damnum clause. This appeal by plaintiff followed.

Initially, plaintiff contends that Supreme Court erred in denying its motion to strike defendants' demand for a jury trial. Between December 1983 and July 1985, Heady executed six secured notes and two personal guarantees in connection with the funds and line of credit extended to his company by plaintiff. Each of these documents contained a clause waiving the right to a jury trial in any litigation where plaintiff was an adverse party. In opposing plaintiff's motion to strike, however, defendants argued that Heady was allegedly unaware of the waiver provisions in the documents and, therefore, should not be bound by them. Supreme Court denied plaintiff's motion, ruling that the waiver provisions in the various notes and agreements were ineffective.

We disagree. As a general proposition, contract provisions waiving a jury trial "are valid and enforceable, unless adequate basis to deny enforcement is set forth by the challenging party" (*Fordham Univ. v Manufacturers Hanover Trust Co.*, 145 AD2d 332, 333; *see Armstrong Co. v Nechamkin*, 55 AD2d 520). The right to a jury trial may even be waived "in an instrument other than that representing the agreement upon which the action is

founded" (*Franklin Natl. Bank v. Capobianco,*25 AD2d 445). Here, defendants have set forth no (965) adequate basis to set aside the waivers. Heady testified that either he or his attorney read all documents to be signed. Moreover, even if Heady had neglected to read the documents containing the waiver provisions, this alone would not affect their validity (*see, James Talcott, Inc. v Wilson Hosiery Co.*, 32 AD2d 524, 525). Although defendants contend that the waivers were actually buried in the small print of lengthy documents, a review of these papers reveals that each of these documents is only one page long and the waiver clause, printed in the same size type as the rest of the document (*see, supra*), appears only a few lines above Heady's signature. Accordingly, defendants' claim that the waiver provision was hidden in the various agreements lacks merit (*see, Kimi Jewelers v Advance Burglary Alarm Sys.*, 161 AD2d 273). As for defendants' contention that they should not be bound by the waivers because their counterclaims largely sound in intentional tort, as opposed to breach of contract, this argument must fail because, unlike the situation presented in *Cohn v. Adler* (139 AD2d 481, 482), the claims contained in defendants' various counterclaims are actually based on plaintiff's alleged violation of various provisions of the underlying agreements. Inasmuch as the claims asserted are tied to the loan agreements, Supreme Court erred in denying plaintiff's motion to strike the jury demand.

Next, the parties dispute the validity of provisions contained in the various agreements providing for the waiver of defendants' right to interpose setoffs and counterclaims. Plaintiff contends that Supreme Court erred in not strictly enforcing these waivers and dismissing all of defendants' affirmative defenses and counterclaims. This argument has some merit. It must be remembered, however, that although "[a] waiver of the right to assert a setoff or counterclaim is not against public policy", the enforceability of such provisions depends on the nature of the

claims involved (*Federal Deposit Ins. Corp. v Marino Corp.*, 74 AD2d 620; *see, European Am. Bank v Mr. Wemmick, Ltd.*, 160 AD2d 905, 906; *Marine Midland Bank v CMR Indus.*, 159 AD2d 94, 104; *Bayside Fuel Oil Depot Corp. v Savino Oil & Heating Co.*, 133 AD2d 658, 659).

For example, a waiver provision will not be enforced to bar a viable setoff or counterclaim sounding in fraud or one which is based upon the creditor's negligence in failing to liquidate collateral upon the guarantor's demand (*see, European Am. Bank v Mr. Wemmick, Ltd., supra,* at 906-907; *Marine Midland Bank v CMR Indus., supra,* at 104; *Federal Deposit Ins. Corp. v Marino Corp., supra,* at 620-621). Further, although a (966) waiver limiting a creditor's responsibility as to collateral may not be enforceable, the creditor may not use such a provision to shield itself from liability if it breaches "the secured party's duty to use reasonable care in the custody and preservation of collateral" (*Marine Midland Bank v CMR Indus., supra,* at 104). It is beyond cavil that "[a] secured party's duty to act with due diligence, reasonableness and care may not be disclaimed by agreement" (*supra*).

Applying these principles to the matter at hand, it is our view that only defendants' first and second affirmative defenses alleging violations of UCC 9-503 and 9-207, respectively, and defendants' fifth, seventh, eighth, ninth and tenth counterclaims, also alleging UCC violations and sounding in fraud, survive enforcement of the waiver clause. Supreme Court erred in not dismissing the remaining counterclaims and affirmative defense. As for plaintiff's contention that any surviving counterclaims should be dismissed on summary judgment grounds, we cannot agree. Defendants' motion papers raise triable issues of fact concerning, among other things, whether plaintiff and its agents utilized reasonable care in the custody, preservation and disposal of the seized collateral (*see,* UCC 9-207) and whether these entities violated the self-help provision contained in UCC 9-503.

Because these and other issues raised cannot be resolved on the papers as a matter of law, their resolution must await trial. (*see,* CPLR 3212[b]).

Nevertheless, although we agree with Supreme Court that certain of the counterclaims interposed by defendants should stand, we find no basis for the denial of plaintiff's motion to strike defendants' request for punitive damages from the ad damnum clause. Although it is true that punitive damages can be recovered in fraud claims (*see, Chase Manhattan Bank v Perla,* 65 AD2d 207, 211), here, even assuming that plaintiff did indeed act in a wanton, willful or malicious manner as defendants allege, defendants allege only private wrongs; they " '[do] not seek to vindicate a public right or deter morally culpable conduct' " (*Quail Ridge Assocs. v Chemical Bank,* 162 AD2d 917, 921, *lv dismissed* 76 NY2d 936, quoting *Halpin v Prudential Ins. Co.,* 48 NY2d 906, 907). Accordingly, Supreme Court erred in failing to grant plaintiff's motion in this respect in its entirety.

The remaining arguments raised by the parties have been examined and found to be unpersuasive. In our view, Supreme Court properly denied plaintiff's motion for summary judgment with respect to defendants' liability in the main action. (967) Defendants' opposition papers and the exhibits attached thereto adequately assert defendants' position that there was no reasonable basis on which plaintiff could have deemed itself "insecure" or concluded that defendants' financial responsibility had "become impaired". Because this proof sufficiently raised questions of fact concerning the reasonableness of plaintiff's declaration of default, a trial is necessary (*see, Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank,* 135 AD2d 102, 109).

Mahoney, P. J., Levine, Mercure and Crew III, JJ., concur. Ordered that the order modified, on the law, without costs, by reversing so much thereof as denied plaintiff's motion for

summary judgment dismissing defendants' third affirmative defense, first through fourth, sixth and eleventh counterclaims and the claim for punitive damages, and denied plaintiff's motion to strike defendants' jury demand; said motions granted to that extent, said defense and claims dismissed, and jury demand stricken; and, as so modified, affirmed.

Appendix B—Statement of Questions Presented to the Appellate Division By The Heady Defendants On Appeal From Judgment, Resulting In February 27, 1995 Decision And Order (See A. App. 3)

STATEMENT OF QUESTIONS

1. Did the plaintiff use a false and fraudulent document (i.e. an "Order of Seizure") which purported to be judicial process in order to convince the defendants and police that the repossession was court ordered in violation of Penal Law 190.50, and did the plaintiff offer "Order Of Seizure" for filing in violation of Penal Law 175.30, and in violation of the Uniform Commercial Code?

2. Did plaintiff convert property of defendants not covered by security agreements with defendants while displaying a weapon which acts constitute criminal larceny pursuant to Penal Law 160.10 and / or 155.30, and 155.55 and / or 155.45 and in violation of the Uniform Commercial Code?

3. Did plaintiff breach the peace because it trespassed upon another's real property in violation of Penal Law 140.05, and break and enter the field office of defendant seizing it and its furniture and equipment contents even though it did not have a security interest in this property, all in violation of the Uniform Commercial Code?

4. Did the plaintiff damage defendants property during and after the repossession, and generally conduct itself in a way that the value of the collateral was diminished due to abusive conduct, or gross disregard, or mishandling, or outside storage of electrical equipment, all in violation of the Uniform Commercial Code?

5. Did plaintiff fail to hold, protect and dispose of the collateral in a commercially reasonable manner as required by the Uniform Commercial Code, performing its obligations to the parties mutual best advantage?

6. Was plaintiff justified in declaring the defendant in default on December 31, 1985 as alleged, and did the lower court improperly restrict testimony thus impeding defendants defense by not allowing testimony and witnesses which if allowed would have concluded that Barclays did not conduct itself in a manner consistent with what a reasonable and prudent person would have done in the same circumstances?

Appendix C—Uniform Commercial Code 9-503

UCC 9-503 "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504."